TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

No. 963

JOHN D. HOOKER, PLAINTIFF IN ERROR,

vs.

JOHN BURR, A. W. HOOKER AND W. A. [illegible],

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED APRIL 8, 1901.

(18,899.)

23993

(18,898.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 670.

JOHN D. HOOKER, PLAINTIFF IN ERROR,

vs.

JOHN BURR, A. W. RHODES, AND W. A. HAMMEL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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In the Supreme Court of the State of California.

JOHN D. HOOKER, Plaintiff & App.,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants.

Transcript on Appeal.

J. S. Chapman, attorney for plaintiff. Anderson & Anderson and E. C. Bower, attorneys for defendants.

Endorsed: Filed Oct. 26 1900 Geo. W Root, clerk. By H. S. Simpson, deputy.

1 In the Superior Court of the County of Los Angeles, State of California.

JOHN D. HOOKER, Plaintiff,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants.

Complaint.

Now comes the plaintiff in the above entitled action and complaining of the defendants, for cause of action alleges:

I.

That heretofore, to-wit, on the 16th day of October, 1893, Anna P. Spencer and Ambrose H. Spencer, then being owners of the property hereinafter described, made and executed their promissory note to Jacob Swiggart for the sum of five thousand ($5000) dol-
2 lars, bearing date the said 16th day of October, 1893, and at the same time and at the same date executed their certain indenture of mortgage to the said Swiggart to secure the payment of the said promissory note and interest as therein provided.

II.

That subsequently to the making of the said promissory note and mortgage the said Jacob Swiggart assigned and transferred said note and mortgage to Charles R. Bishop.

III.

That prior to the — day of ——, 189–, the said Ambrose H. Spencer departed this life, and on the — day of ——, 189–, Frank M. Kelsey was duly appointed by an order of the superior court of Los Angeles county the administrator of the estate of the said

Ambrose H. Spencer, deceased, and duly qualified as such and became and was at the time of the commencement of the suit hereinafter mentioned the duly qualified and acting administrator of the said estate.

IV.

That afterwards, to-wit, on the — day of ——, 189–, the said Charles R. Bishop, still being the owner and holder of the said promissory note and the same being overdue, commenced a suit in the said superior court of the county of Los Angeles, State of California, against the said Frank M. Kelsey as administrator of the estate of Ambrose H. Spencer, deceased, Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, Isabel
3 Spencer, John Doe, Richard Roe and Jane Doe, to recover the amount then due upon the said promissory note for principal and interest, and to foreclose the said mortgage and to obtain a decree for the sale of the said mortgaged premises. And therein such proceedings were had in the said action, (which said case is numbered 29,175 on the register of actions of said superior court,) that on the 14th day of May, 1898, a judgment was duly rendered in the said cause whereby it was adjudged and decreed that there was due to the plaintiff in the said action upon the said promissory note the sum of six thousand seven hundred eighty-two and 49-100 ($6782.49) dollars in gold coin of the U. S., and further decreed that the said sum was a lien upon the said mortgaged property and also a judgment for the sale of the said mortgaged premises for the payment of the said sum so found to be due.

V.

That afterwards, to-wit, on the 16th day of May, 1898, an execution was duly issued out of said court and in the said cause directing the sale of the said mortgaged premises, and was duly delivered to the defendant John Burr, who then was the duly qualified and acting sheriff of the county of Los Angeles, State of California; and under and by virtue of said writ of execution the said sheriff did duly sell the said property hereinafter described on the 13th day of June, 1898, at 12 o'clock m. to this plaintiff the said John D. Hooker, for the sum of nine thousand five hundred ($9500) dollars, he being the highest bidder and the same being the highest amount bid
4 for the said property hereinafter described, and which said sum was paid to the said John Burr, sheriff as aforesaid, by the plaintiff, and thereupon a certificate of sale was duly issued by the said John Burr, as sheriff, as aforesaid, to the plaintiff herein, and a like certificate was duly recorded in the office of the county recorder of the county of Los Angeles, State of California.

VI.

That the plaintiff was entitled to a deed from the said John Burr, conveying the said property so purchased by him, on the 13th day of December, 1898.

VII.

The said property so sold by the said John Burr as sheriff as aforesaid under the said execution and purchased by this plaintiff for the said sum of nine thousand five hundred ($9500) dollars is situate in the city of Los Angeles, county of Los Angeles, State of California, and is described as follows, to-wit:

Lot three (3) and the southerly 17½ feet of lot four (4) in block 52 of the Huber tract according to a map of said tract recorded in the office of the county recorder of Los Angeles, in Book 2 at page 280 of miscellaneous records, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

VIII.

The plaintiff further avers that no deed has ever been executed to this plaintiff by the said John Burr, or any other person
5 or officer of the county of Los Angeles for the said property, and that the term of office of the said John Burr as sheriff of the county of Los Angeles expired on the first Monday in January, 1899.

IX.

Plaintiff further avers that the defendant, A. W. Rhodes, did, as this plaintiff is informed and believes, and upon such information and belief alleges, deliver to the said John Burr, sheriff of the county of Los Angeles, State of California, on or about the 12th day of December, 1898, the sum of ten thousand and seventy ($10,070) dollars in gold coin of the U. S. as and for the redemption of the said property hereinabove described and so sold to plaintiff, from the said sale; the said sum being as was claimed by the said defendant the amount so bid by this plaintiff, to-wit, $9500 paid to the said sheriff as aforesaid and interest thereon at the rate of one per cent. per month from the date of the said sale, and did at the same time deliver to the said sheriff a notice addressed to this plaintiff as such purchaser that he, the said A. W. Rhodes, did redeem the said property from said sale, and did in such notice state that he made such redemption as a judgment creditor of Anna P. Spencer, and not otherwise.

X.

Plaintiff further avers that prior to the said attempted redemption one E. R. Nichols had brought a suit in the said superior court of the county of Los Angeles, State of California, against the said Anna P. Spencer to recover a sum alleged to be due to the
6 plaintiff from her; and such proceedings were thereafter had in the said action that on the 30th day of September, 1897, the said E. R. Nichols recovered a judgment against the said Anna P. Spencer in said suit for the sum of one thousand and fifteen and 30-100 ($1015.30) dollars, and costs and which said judgment was docketed in the said superior court on *on* the 1st day of October, 1897.

XI.

That subsequently to the recovery of said judgment and the docketing thereof as aforesaid the said judgment was assigned by the said E. R. Nichols to the defendant, A. W. Rhodes, and the said Rhodes claimed the right to redeem the said property from said sale so made to this plaintiff, as the assignee of the said judgment.

XII.

Plaintiff further avers that the claim upon which the said action was brought by the said E. R. Nichols against the said Anna P. Spencer was not a lien or charge of any kind upon the said property, and did not become a lien upon any property belonging to the said Anna P. Spencer, until the docketing thereof on the 1st day of October, 1897.

XIII.

Plaintiff further avers that long prior to the docketing of the said judgment in favor of the said E. R. Nichols, the said Anna P. Spencer had made, executed and delivered to one Charles T. Shepherd a deed of conveyance of all her right, title and interest in the said property, and which deed had long prior to the entry of
7 the said judgment been duly recorded in the office of the county recorder of the county of Los Angeles, State of California.

XIV.

Plaintiff further avers upon information and belief that the said judgment so recovered by the said E. R. Nichols against the said Anna P. Spencer was not duly given or made, and that the same was entered without authority; and plaintiff further avers that the said Anna P. Spencer was not the owner of any right, title or interest in the said property so sold to this plaintiff as aforesaid at the time said pretended judgment was given, nor at any time afterwards, and that the said judgment rendered in the said action brought by the said E. R. Nichols, which action is numbered 28,939 on the register of actions of said superior court of said Los Angeles county was not and never became a lien upon the said property or any part thereof, and the said A. W. Rhodes was not a redemptioner at the time that said pretended redemption was made nor at any other time, and that the amount of money paid by the said A. W. Rhodes to the said sheriff was not sufficient in amount to effect any redemption if the said A. W. Rhodes had been entitled to redeem said property.

XV.

Plaintiff further avers that afterwards, to-wit, on or about the 18th day of February, 1899, the defendant, W. A. Hammell (who was at the general election held in November, 1898, elected sheriff of the county of Los Angeles, and qualified as such sheriff on the
8 first Monday in January, 1899;) without any right or authority executed an instrument purporting to be a deed of

conveyance of the said property to the said A. W. Rhodes as such redemptioner from the said sale; and the said defendant, A. W. Rhodes, is now claiming to be the owner of the said property under such deed of conveyance, and not otherwise.

XVI.

Plaintiff further avers upon information and belief that the said conveyance so made by the said defendant, W. A. Hammel, as sheriff of Los Angeles county and as the successor of the said John Burr, is illegal and void, but that the said deed is nevertheless a cloud upon the title of this plaintiff to the said property.

XVII.

Plaintiff further avers that the plaintiff has never been paid the said sum so delivered to the said sheriff, John Burr, as aforesaid, for the purpose of effecting such pretended redemption, nor any part thereof, nor has any part thereof ever been tendered to the said plaintiff.

XVIII.

Plaintiff further avers that by the making of the said conveyance to the said A. W. Rhodes the plaintiff has been greatly damaged, to-wit, in the sum of two thousand five hundred ($2500) dollars.

XIX.

Plaintiff further avers that prior to the commencement of this action, and after the 13th day of December, 1898, he tendered
9 to the defendant, W. A. Hammel, the present sheriff of the county of Los Angeles, the fee for making a sheriff's deed of property sold under foreclosure or other execution sale, to-wit, the sum of one dollar and sixty cents ($1.60), which said sum was by the said defendant, W. A. Hammel, then and there declared to be the fee for making such deed; and at the same time and prior to the commencement of this action demanded of the said W. A. Hammel that he execute to this plaintiff a deed of conveyance of said above described property under and in pursuance of the said sale made under the said writ of execution issued upon the said decree of foreclosure, but the said defendant refused to execute such deed or any deed to this plaintiff. And plaintiff thereupon tendered the said amount to the said John Burr, the former sheriff of the county of Los Angeles, and the person who made the said sale, and demanded of him that he execute such deed to this plaintiff; and which said tender of the said fee and demand for the said deed of the said John Burr were both made prior to the commencement of this action, and he, the said John Burr, did then and there refuse to make such or any conveyance of said property.

And the plaintiff herewith deposits the said sum of one dollar and sixty cents ($1.60), the fee for the execution of the said deed, with the clerk of this court, to be paid to the said W. A. Hammel or

John Burr upon the execution of a deed to plaintiff for the said property.

Wherefore, plaintiff prays judgment:

1. That the deed executed by the said defendant, W. A. Hammel, to the said A. W. Rhodes be decreed to be void, and that the same be cancelled and annulled.

2. And that the court further decree that a deed be executed to this plaintiff by the said W. A. Hammel or the said John Burr conveying the said property to this plaintiff under and in pursuance of the said sale so made by the said John Burr.

3. That in the meantime and pending this action the said A. W. Rhodes be enjoined and restrained from making any conveyance of the said property. And that it be further decreed that the said pretended redemption from the said sale by the said A. W. Rhodes was invalid and void, and that the same be cancelled, and that the said A. W. Rhodes has no right to redeem the said property from the said sale or any right to a conveyance thereof.

4. That it be further adjudged that the plaintiff recover of and from the said defendants, A. W. Rhodes and W. A. Hammel, two thousand five hundred ($2500) dollars as damages.

5. And that it be further adjudged that plaintiff recover of the defendants costs of suit, and for such other and further relief as may be just.

J. S. CHAPMAN,
Attorney for Plaintiff.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

John D. Hooker being duly sworn, deposes and says, that he is the plaintiff in the foregoing complaint named, and has heard read the said foregoing complaint, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN D. HOOKER.

Subscribed and sworn to before me this 14th day of March, 1899.
[SEAL.] WARD CHAPMAN,
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed Mar. 14, 1899. C. W. Bell, clerk. By C. G. Keyes, deputy clerk.

(Title of Court and Cause.)

Demurrer.

Now come the above named defendants, (the said defendant John Burr by his undersigned attorneys, duly authorized thereto, waiving the service of summons herein), and make an appearance in said

action, and demur to the plaintiff's complaint herein, and for grounds of demurrer allege:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint does not state facts sufficient to constitute a cause of action upon the ground alleged in said complaint that the said defendant Rhodes paid to the defendant John Burr, as sheriff, the amount bid by the plaintiff for the purchase of the property described in the complaint, plus one per cent. per month interest thereon, instead of two per cent. interest thereon.

12

ANDERSON & ANDERSON,
GEO. J. DENIS, AND
R. H. VARIEL,
Attorneys for Defendants.

Dated March 23rd, 1899

Rec'd copy of within demurrer this 23rd day of March, 1899.
J. S. CHAPMAN,
(Per P. O.)
Attorney for Plaintiff.

Order Overruling Demurrer.

April 17, 1899.—Demurrer overruled. Notice waived.
Attest: C. W. BELL, *Clerk*,
By J. O. LOWE, *Deputy*.

(Title of Court and Cause.)

Answer.

Now come the above-named defendants, and answering the plaintiff's complaint herein, deny, and allege as follows:

I.

Answering the matters set forth in paragraph VI of said complaint defendants deny that the plaintiff was entitled to a deed from the said John Burr, conveying the said property so purchased by him on the 13th day of December, 1898, or at any other time.

13

II.

Answering the matters set forth in paragraph XII of said complaint defendants deny that the claim upon which the said action was brought by the said E. R. Nichols against the said Anna P. Spencer, was not a charge of any kind upon the said property, but on the contrary, defendants allege that the claim upon which the

said action was brought by the said E. R. Nichols, was a *bona fide* indebtedness due and owing by the said Anna P. Spencer to the said E. R. Nichols, long prior to any conveyance made or attempted to be made by the said Anna P. Spencer to the said Charles J. Shepherd (erroneously described in the plaintiff's complaint as Charles T. Shepherd).

III.

Answering the matters set forth in paragraph XIV of said complaint defendants deny that the said judgment so recovered by the said E. R. Nichols against the said Anna P. Spencer, was not duly given or made, or that the same was entered without authority. Defendants deny that the said Anna P. Spencer was not the owner of any right, title or interest in said property claimed by the plaintiff, at the time the said judgment in favor of said Nichols was given; and deny that she was not the owner of some right, title and interest in the property thereafter. Deny that said judgment rendered in said action brought by said E. R. Nichols, and being numbered 28939 on the register of actions of said superior court of said Los Angeles county was not, or that it never became a lien upon the said property affected by this action; but, on the contrary, defend-
14 ants allege that the judgment rendered in said action numbered 28939, upon its docketing thereupon became a lien, and continued to be and remain and was a lien thereon at the time the said Rhodes made the payments to John Burr, sheriff of the county of Los Angeles, as alleged and set forth fully in paragraph IX of the plaintiff's complaint. Defendants deny that the said A. W. Rhodes was not a redemptioner at the time the said redemption was made by him; and deny that the amount of money paid by the said A. W. Rhodes to the said sheriff, John Burr, was not sufficient in amount to effect a redemption; but on the contrary, defendants allege that said judgment held by said Rhodes, as assignee, was a valid judgment, and the same constituted a lien upon the property affected by this action, and that at the time the said Rhodes made the payments to the said sheriff mentioned in paragraph IX of plaintiff's complaint the said Rhodes was a lawful and proper redemptioner, and that he paid the full amount of money required by law from him, to constitute a full proper and complete redemption from the said sale made to the said plaintiff.

IV.

Answering the matters set forth in paragraph XV of plaintiff's complaint, defendants admit that on or about the 18th day of February, 1899, the defendant W. A. Hammel executed a deed of conveyance of the said property to said defendant A. W. Rhodes as such redemptioner from said sale, and that said defendant Rhodes is now claiming to be the owner of said property under said deed of
15 conveyance, but defendants deny that such deed was executed by said Hammel without any right or authority.

V.

Answering the matters set forth in paragraph XVI of said complaint defendants deny that the said conveyance — was made by the said defendant W. A. Hammel, as sheriff of Los Angeles county, and as the successor of the said John Burr, aforesaid, is illegal or void, or that said deed is a cloud upon any title in the plaintiff to the said property; and further deny that plaintiff has any title or right to the said property.

VI.

Answering the matters set forth in paragraph XVII of said complaint, defendants deny that the moneys paid to the said John Burr for the purpose of effecting such redemption by the said defendant Rhodes, have not ever been tendered to the plaintiff, but on the contrary, defendants allege that the said defendant Rhodes sought on two distinct occasions to personally tender said money to the said plaintiff, prior to its payment to said Burr, but the said plaintiff purposely, as defendants are informed and believe, avoided meeting said defendant Rhodes, and kept out of the way of the latter so as to prevent such personal tender of said money to him, said plaintiff; and the said defendants further allege that said moneys, after the same had been received by the said Rhodes to the said sheriff were by the said sheriff John Burr, and his deputies, held in his said office, and that immediately after receiving the same, said John Burr, sheriff, by his duly authorized deputy notified the said
16 John D. Hooker, by and through his attorney, John S. Chapman, that said moneys had been paid to him, said Burr, by said Rhodes on redemption, and that the same would be delivered and paid to said Hooker or his said attorney upon the said Hooker executing to said Burr a proper receipt therefor. That said attorney for plaintiff, did not in express terms refuse to receive said money, but informed said sheriff that he would let the matter rest as it was for the time until he should look into the matter, and that he would talk with him further about it later.

That said plaintiff, and his said attorney, during the continuance in office of said Burr, never thereafter spoke to said Burr about the matter, and neither demanded of said John Burr, or his duly authorized deputies, that he execute any deed whatsoever to the plaintiff conveying said property; and that neither said Burr, nor any of his said deputies, ever had any notice or information from the plaintiff or from his said attorney, other than that the said plaintiff and his said attorney expected to accept said money; and that neither the plaintiff nor his said attorney, at any time, in express terms refused to said John Burr or to his said deputies, to receive said money so paid to said Burr by said defendant Rhodes upon such redemption.

VII.

Answering the matters set forth in paragraph XIX of said complaint, defendants allege that they have no information or belief as to the matters alleged therein, and on that ground deny the same,

and further allege that the tender stated by plaintiff in said paragraph XIX to have been made to said W. A. Hammel, sheriff
17 of Los Angeles county, if made at all, was made by the said plaintiff subsequently to the going into the office of the said W. A. Hammel, and subsequently to the expiration of the term of office of said sheriff John Burr, and further that said tender of said sum of $1.60 to said John Burr, mentioned in said paragraph XIX if made at all, was made subsequently to the expiration of the term of office of said John Burr.

Wherefore, said defendants pray that said plaintiff take nothing by his action, and that they be hence dismissed with their costs.

ANDERSON & ANDERSON,
GEO. J. DENIS,
R. H. F. VARIEL,
Attorneys for Defendants.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

A. W. Rhodes, being duly sworn, deposes and says:

That he is one of the defendants in the foregoing action; that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

A. W. RHODES.

Subscribed and sworn to before *be* this 28th day of April, 1899.

[SEAL.] E. W. BAKER,
Notary Public in and for Los Angeles County, State of California.

Filed April 28th, 1899.

C. W. BELL, *Clerk*,
By C. G. KEYES, *Deputy*.

18 Rec'd copy of within answer this 28th day of April, 1899.

J. S. CHAPMAN,
Attorney for Plaintiff.

(Title of Court and Cause.)

Amended Answer.

Now comes the defendants, and file the following amended answer to the plaintiff's complaint herein, and allege:

I.

Defendants deny that the plaintiff was entitled to a deed from said John Burr or from said W. A. Hammel, conveying to him the property described in the complaint, on the 13th day of Dec. 1898 or any other time.

II.

Defendants deny that the claim upon the judgment of E. R. Nichols — was obtained against Anna P. Spencer was not a charge of any kind upon said property, but aver that it was a *bona fide* existing debt, and that said judgment became a lien upon the property described in the complaint and all the property of said Anna P. Spencer upon the same being docketed on Oct. 1st, 1897.

III.

Defendants deny that said Anna P. Spencer, prior to the docketing of said judgment executed to Charles T. Shepherd (or Charles J. Shepherd) a deed conveying to him all her right, title and interest in said property; and deny that any deed of said property to
19 said Shepherd was recorded prior to the entry of said judgment.

IV.

Defendants deny that the said judgment of E. R. Nichols against said Anna P. Spencer was not duly given and made; and deny that said judgment was entered without authority; and deny that said Anna P. Spencer was not the owner of the right, title and interest in said property at the time said judgment was given. But aver that said Anna P. Spencer was the owner of said property at the time said judgment was docketed and thereafter; and deny that said judgment never became a lien upon said property described in the complaint. But aver that said judgment did become a lien ther-on, upon the same being docketed. And deny that said A. W. Rhodes was not a redemptioner at the time he redeemed said property, and deny that the amount paid by him for said redemption was not sufficient.

V.

Defendants deny that the deed executed by W. A. Hammel, sheriff, to A. W. Rhodes was made without right or authority.

VI.

Defendants deny that said deed, executed by W. A. Hammel, sheriff, to said A. W. Rhodes, conveying to him said property, is illegal or void. And deny that said deed is a cloud upon any title of plaintiff to said property; and deny that plaintiff has any title or *intent* in said property.

VII.

20 Defendants deny that the money paid to John Burr for the purpose of redeeming said property has not been offered to the plaintiff.

VIII.

Defendants deny that plaintiff has been damaged $2500.00 or any other sum by the said making of said conveyance to A. W. Rhodes.

IX.

Answering the matters set forth in paragraph XIX of said complaint, defendants allege that they have no information or belief as to the matters alleged therein, and on that ground deny the same, and further allege that the tender stated by plaintiff in said paragraph XIX to have been made to said W. A. Hammel, sheriff of Los Angeles county, if made at all, was made by the said plaintiff subsequently to the going into office of the said W. A. Hammel, and subsequently to the expiration of the term of office of said sheriff, John Burr, and further that said tender of said sum of $1.60 to said John Burr, mentioned in said paragraph XIX if made at all, was made subsequently to the expiration of the term of office of said John Burr, and subsequently to the execution of a deed of said premises to this defendant, Rhodes, as redemptioner, and as provided by law.

—— ——.
—— ——.

For a further and separate answer, defendants aver:

I.

That in April, 1895, said Anna P. Spencer, referred to in paragraph X of the complaint, became indebted to said E. R.
21 Nichols, referred to in said complaint, and the same was a *bona fide* debt for a valuable consideration; and that in February, 1896, suit was commenced on said debt in the superior court of said county of Los Angeles, to-wit: No. — in said court, which suit was dismissed about January 19th, 1897, by said Anna P. Spencer, executed to said Nichols her promissory note for $875.00 besides interest, due 6 months after date, thereafter, to-wit: on the — day of ——, 1897, suit was commenced in said superior court on said note by said E. R. Nichols against said Anna P. Spencer in action No. 28939 in said court; and judgment in said action was duly given and made in favor of said Nichols against said Spencer for $1015.00, which said judgment was docketed Oct. 1st, 1897.

II.

That on the 7th day of Dec. 1898, said E. R. Nichols, in writing, duly sold, assigned and transferred to defendant A. W. Rhodes, the said judgment mentioned in paragraph I of this answer, and at the time of said transfer the said judgment was valid, of full force and unpaid.

III.

That on the 1st day of June, 1897, and thereafter during the month of June, 1897, said Anna P. Spencer was also indebted to other persons besides said E. R. Nichols in various sums of money.

IV.

That while said debt on which said judgment was obtained was a valid subsisting debt against said Anna P. Spencer, and while
22 she was also indebted to other persons in various sums, defendants are informed and believe — upon said information and belief allege, that said Anna P. Spencer fraudulently and with the intent to hinder, delay and defraud her creditors and the said E. R. Nichols, conveyed to one Orange E. Dickey, all of the property she then owned, amounting in value to $150,000.00 or thereabouts, which conveyance included the property described in the complaint. That said deed was executed by said Spencer to said Dickey without any valuable consideration. That on the same day, to-wit: June 10th, 1897, said Orange E. Dickey executed a deed to Charles J. Shepherd purporting — conveying all of said property to said Shepherd. That said Shepherd knew at the time said deed was executed to said Dickey that the said Anna P. Spencer was in debt, and that there was no valuable consideration paid said Spencer by said Dickey for said property. That there was no consideration for the deed from Dickey to Shepherd unless it be an indebtedness of about $300.00 owing from said Spencer to said Shepherd, and some agreement on the part of said Shepherd to financially assist said Spencer in litigation in which she was then involved. But all of said obligations of said Spencer to said Shepherd were fully satisfied and discharged, so that said Shepherd had no claim to or *intent* on said property described in the complaint, when the sheriff's deed thereto was executed to defendant Rhodes. That the deed from Spencer to Dickey was placed on record at once, to-wit: about June 10th, 1897, but the deed from Dickey to Shepherd was not placed on record until the 9th day of Dec., 1898. That on Sept. 10th, 1897, said Dickey executed
23 a deed to one T. L. Stiles, purporting to convey to said Stiles a third interest in the property described in the complaint (and other property.) That said deed from Dickey to Stiles, was without any consideration, and was made with intent to hinder and delay creditors of said Spencer; and it was made at the instance of said Spencer and by the consent of said Shepherd and said Spencer and said Shepherd, and Stiles all knew at the time it was made that it was without any consideration and for the purpose and with the intent to hinder and delay the creditors of said Spencer. That the deed from Dickey or Stiles was recorded about Sept. 10th, 1897. That on Oct. 5th, 1897, said Stiles conveyed by deed to said Shepherd, the property which said Dickey had conveyed to him; but the deed from Stiles to Shepherd was not recorded until Dec. 9th, 1898. That there was no consideration for the deed from Stiles to Shepherd.

V.

That by said conveyance of said Anna P. Spencer to said Dickey, said Anna P. Spencer was left without any property appearing of record in her name, and without any property at all except that included in said conveyance.

VI.

That after said conveyance was executed the said Anna P. Spencer remained in possession of all of said property by herself or tenants, and collected the rents from the same, until she was enjoined by the court, and exercised other acts of ownership over said property, and claimed the same, and on various occasions attempted to ne-
24 gotiate said property as her own with the knowledge of said Shepherd.

VII.

Defendants aver that said deed was fraudulent and void; and that the title to the property purporting to be conveyed thereby remained in said Anna P. Spencer, and that the title to said property was so vested on and after the 1st day of Oct. 1897.

VIII.

That after the transfer of said judgment to said A. W. Rhodes said Rhodes was unable to find said property, and there was no property out of which said judgment could be satisfied except the property included in said deed of conveyance. And as said property mentioned in the complaint had been sold under a mortgage foreclosure, redemption thereof was the only manner in which he could reocver his said debt.

For a further and separate answer defendants aver.

Defendants here incorporate, adopt and make paragraphs I, II of the 1st separate answer herein a part of this separate answer, and herein refer to the same as a part thereof.

II.

The defendants are informed and believe and on said information and belief allege, that on or about June 10th, 1897, said Anna P. Spencer was indebted to said Charles J. Shepherd in the sum of about $300.00, and that to secure the payment of said amount, and any other advances which said Shepherd might make to assist her in litigation in which she was then involved, she executed on
25 June 10th, 1897, to one Orange E. Dickey, a deed of conveyance purporting to convey to him property to the value of about $150,000.00 which included the property described in the complaint, and which was all the property then owned by said Anna P. Spencer. That said deed was executed to said Dickey with the understanding that he should convey the said property to said Charles J. Shepherd, and that on the same day, to-wit, June 10th, 1897, said Dickey did execute a deed of conveyance of all of said property to said Charles J. Shepherd.

That there was no consideration for the deed of Anna P. Spencer to Orange E. Dickey and the only consideration for the deed from said Dickey to said Shepherd was the agreement between said Shepherd and said Spencer that said Shepherd should be secured in a debt of about $300.00 said Spencer owed him, and in further finan-

cial assistance he should render to said Spencer in matters of litigation in which she was then involved. That said Anna P. Spencer remained in possession of all of said property, collected the rents thereof, claimed the same as her own, and exercised acts of ownership over the same, from the time of the execution of said deed until after Oct. 1st, 1897.

ANDERSON & ANDERSON,
R. H. VARIEL,
GEO. J. DENIS, AND
E. C. BOWER,
(P'r. E. C. B.),
Attorneys for Defendants.

26 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

A. W. Rhodes being duly sworn deposes and says that he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

A. W. RHODES.

Subscribed and sworn to before me this 6th day of July, 1899.
[SEAL.] HATTIE M. LINDENFELD,
Notary Public.

Filed July 8, 1899.

C. W. BELL, *Clerk,*
By C. G. KEYES,
Deputy Clerk.

Service of within answer is hereby admitted this 8th day of July, 1899.

J. S. CHAPMAN,
Attorney for Plaintiff.

(Title of Court and Cause.)

Amended Complaint.

Now comes the plaintiff in the above entitled action, and amending the complaint filed herein by leave of the court first obtained, for such amended complaint alleges and avers as follows, to-wit:

I.

Plaintiff alleges that heretofore, to-wit, on the 16th day of October, 1893, Anna P. Spencer and Ambrose H. Spencer, then
27 being the owners of the property hereinafter described, made and executed their promissory note to Jacob Swiggart, for the sum of five thousand dollars, bearing date the said 16th day of

October, 1893, and at the same time and at the same date executed their certain indenture of mortgage to the said Swiggart, to secure the payment of the said promissory note and interest, as therein provided, which said mortgage was acknowledged and certified so as to entitle it to record, and was duly recorded in the office of the county recorder of Los Angeles county, on the 16th day of October, 1893.

II.

That subsequently to the making of the said promissory note and mortgage the said Jacob Swiggart assigned and transferred said note and mortgage to Charles R. Bishop.

III.

That prior to the — day of ——, 189–, the said Ambrose H. Spencer departed this life, and on the — day of ——, 189–, Frank M. Kelsey was duly appointed by an order of the superior court of Los Angeles county, the administrator of the estate of the said Ambrose H. Spencer, deceased, and duly qualified as such and became and was at the time of the commencement of the suit hereinafter mentioned, the duly qualified and acting administrator of the said estate.

IV.

That afterwards, to-wit, on the — day of ——, 189–, the said Charles R. Bishop, still being the owner and holder of the said promissory note, and the same then being overdue, commenced a suit in the said superior court of the county of Los Angeles, State of
28 California, against the said Frank M. Kelsey, as administrator of the estate of Ambrose H. Spencer, deceased, Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, Isabel Spencer, John Doe, Richard Roe and Jane Doe, to recover the amount then due upon the said promissory note for principal and interest, and to foreclose the said mortgage and to obtain a decree for the sale of the said mortgaged premises. And therein such proceedings were had in the said action, (which said case is numbered 29,175 on the register of actions of said superior court) that on the 14th day of May, 1898, a judgment was duly rendered in the said cause whereby it was adjudged and decreed that there was due to the plaintiff in the said action upon the said promissory note the sum of six thousand seven hundred and eighty-two and 49-100 ($6782.49) dollars in gold coin of the United States, and further decreed that the said sum was a lien upon the said mortgaged property and also a judgment for the sale of the said mortgaged premises for the payment of the said sum so found to be due.

V.

That afterwards, to-wit, on the 16th day of May, 1898, an execution was duly issued out of said court and in said cause directing the sale of the said mortgaged premises, and was duly delivered to the defendant John Burr, who then was the duly qualified and acting

sheriff of the county of Los Angeles, State of California; and under and by virtue of the said writ of execution the said sheriff did duly sell the said property hereinafter described on the 13th day of June, 1898, at 12 o'clock m. to this plaintiff, the said John
29 D. Hooker, for the sum of nine thousand five hundred ($9500) dollars, he being the highest bidder and the same being the highest amount bid for the said property hereinafter described, and which said sum was paid to the said John Burr, sheriff as aforesaid, by the plaintiff, and thereupon a certificate of sale was duly issued by the said John Burr as sheriff as aforesaid, to the plaintiff herein, and a like certificate was duly recorded in the office of the county recorder of the county of Los Angeles, State of California.

VI.

That the plaintiff was entitled to a deed from the said John Burr conveying the said property so purchased by him on the 13th day of December, 1898.

VII.

That the said property so sold by the said John Burr as sheriff as aforesaid, under the said execution and purchased by this plaintiff for the said sum of nine thousand five hundred ($9500) dollars is situated in the city of Los Angeles, county of Los Angeles, State of California, and is described as follows, to-wit:

Lot three (3) and the southerly 17½ feet of lot four (4) in block 52, of the Huber tract, according to a map of said tract recorded in the office of the county recorder of Los Angeles county, in Book 2, at page 280, of miscellaneous records, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

VIII.

30 The plaintiff further avers that no deed has ever been executed to this plaintiff by the said John Burr, or any other person or officer of the county of Los Angeles for the said property, and that the term of office of the said John Burr as sheriff of the county of Los Angeles expired on the first Monday in January, 1899.

IX.

Plaintiff further avers that the defendant, A. W. Rhodes did, as this plaintiff is informed and believes, and upon such information and belief alleges, deliver to the said John Burr, sheriff of the county of Los Angeles, State of California, on the 12th day of December, 1898, a check bearing date the said 12th day of December, 1898, for the sum of ten thousand seventy dollars, drawn on the First National Bank of Los Angeles, by Clark and Bryan, and of which said check the following is a copy:

"LOS ANGELES, CAL., *Dec.* 12, 1898.

Pay to the order of John Burr, sheriff, $10,070 ten thousand & seventy dollars. To the First national bank, Los Angeles, Cal.
(Signed) CLARK & BRYAN."

A two-cent revenue stamp was placed on the said check and cancelled by the letters "C. & B., 12–98."

And plaintiff further avers upon the said information and belief that the said check was so delivered by the said A. W. Rhodes as and for the payment to the said sheriff of said sum of $10,070 and as and for the redemption of the said property hereinbefore described, and so sold to this plaintiff from the said sale thereof to the plaintiff under the said foreclosure decree, the said amount of $10,070
31 being as was claimed by the said defendant the amount so bid by this plaintiff, to-wit, $9500 paid to the said sheriff as aforesaid and interest thereon at the rate of one per cent. from the time of the said sale, and did at the same time deliver to said sheriff a notice addressed to this plaintiff as such purchaser that he, the said A. W. Rhodes, did redeem the said property from said sale, and did in such notice state that he made such redemption as a judgment creditor of Anna P. Spencer, and not otherwise.

And plaintiff further avers that no other or different payment of said or any sum was ever made by the said defendant to the said sheriff as or for the redemption of said property. And plaintiff avers that the said check was no payment to the said sheriff for the plaintiff and was insufficient to effect any redemption of the said property, nor was the amount thereof the amount necessary to effect a redemption had such sum been paid in gold coin of the United States.

X.

Plaintiff further avers that prior to the said attempted redemption one E. R. Nichols had brought a suit in the said superior court of the county of Los Angeles, State of California, against the said Anna P. Spencer to recover a sum alleged to be due to the plaintiff from her; and such proceedings were thereafter had in the said action that on the 30th day of September, 1897, the said E. R. Nichols recovered a judgment against the said Anna P. Spencer in said suit for the sum of one thousand and fifteen and 30-100 ($1015.30)
32 dollars, and costs, and which said judgment was docketed in the said superior court on the first day of October, 1897.

XI.

That subsequently to the recovery of said judgment and the docketing thereof as aforesaid, the said judgment was assigned by the said E. R. Nichols to the defendant, A. W. Rhodes, and the said Rhodes claims the right to redeem the said property from said sale so made to this plaintiff as the assignee of the said judgment.

XII.

Plaintiff further avers that the claim upon which the said action was brought by the said E. R. Nichols against the said Anna P. Spencer was not a lien or charge of any kind upon the said property and did not become a lien upon any property belonging to the said Anna P. Spencer unless by docketing the judgment upon said claim on the 1st day of October, 1897.

XIII.

Plaintiff further avers that on the 10th day of June, 1897, the said Anna P. Spencer made, executed and delivered to Orange E. Dickey, her certain conveyance, whereby she conveyed to the said Orange E. Dickey, the said land hereinbefore described, to-wit:

Lot three (3) and the southerly 17½ feet of lot four (4), block 52, of the Huber tract, and which said deed of conveyance was duly acknowledged and certified so as to entitle it to be recorded, and the said deed was recorded on the 10th day of June, 1897, in Book 1170, page 56 of deeds, in the office of the recorder of Los Angeles county:

That by the terms of the said deed, the said Anna P. Spencer
33 granted, bargained and sold the said property to the said Orange E. Dickey.

And plaintiff further avers that afterwards, the said property so conveyed to the said Orange E. Dickey passed, by divers mesne conveyances, to Charles J. Shepherd, and was at the date of the said pretended redemption of the said property by the said A. W. Rhodes, still vested in the said Charles J. Shepherd.

XIV.

Plaintiff further avers upon information and belief that the said judgment so recovered by the said E. R. Nichols against the said Anna P. Spencer was not duly given or made, and that the same was entered without authority; and plaintiff further avers that the said Anna P. Spencer was not the owner of any right, title or interest in the said property so sold to this plaintiff as aforesaid at the time said pretended judgment was given, nor at any time afterwards, and that the said judgment rendered in the said action brought by the said E. R. Nichols (which action is numbered 28,939 on the register of actions of said superior court of said Los Angeles county) was not and never became a lien upon the said property or any part thereof, and the said A. W. Rhodes was not a redemptioner at the time that said pretended redemption was made nor at any other time, and that the said check so delivered by the said A. W. Rhodes to the said sheriff was not sufficient to effect any redemption if the said A. W. Rhodes had been entitled to redeem said property, or had paid said amount in gold coin.

34 XV.

Plaintiff further avers that afterwards, to-wit, on or about the 18th day of February, 1899, the defendant, W. A. Hammel, (who was at

the general election held in November, 1898, elected sheriff of the county of Los Angeles, and qualified as such sheriff on the first Monday in January, 1899); without any right or authority defendant executed an instrument purporting to be a deed of conveyance of the said property to said A. W. Rhodes as such redemptioner from the said sale; and the said defendant, A. W. Rhodes, is now claiming to be the owner of the said property under such deed of conveyance, and not otherwise.

XVI.

Plaintiff further avers upon information and belief that the said conveyance so made by the said defendant, W. A. Hammel, as sheriff of Los Angeles county, and as the successor of the said John Burr, is illegal and void, but that the said deed is nevertheless a cloud upon the title of this plaintiff to the said property.

XVII.

Plaintiff further avers that the plaintiff has never been paid the said sum so delivered to the said sheriff, John Burr, as aforesaid, for the purpose of effecting such pretended redemption, nor any part thereof, nor has any part thereof ever been tendered to the said plaintiff.

XVIII.

Plaintiff further avers that by the making of the said con-
35 veyance to the said A. W. Rhodes, the plaintiff has been greatly damaged, to-wit, in the sum of two thousand five hundred ($2500) dollars.

XIX.

Plaintiff further avers that prior to the commencement of this action, and after the 13th day of December, 1898, he tendered to the defendant, W. A. Hammel, the present sheriff of the county of Los Angeles, the fee for making a sheriff's deed of property sold under foreclosure or other execution sale, to-wit, the sum of one dollar and sixty cents ($1.60), which said sum was by the said defendant, W. A. Hammel, then and there declared to be the fee for making such deed; and at the same time and prior to the commencement of this action, demanded of the said W. A. Hammel that he execute to this plaintiff a deed of conveyance of said above-described property under and in pursuance of the said sale made under the said writ of execution issued upon the said decree of foreclosure, but the said defendant refused to execute such deed, or any deed to this plaintiff. And plaintiff thereupon tendered the said amount to the said John Burr, the former sheriff of the county of Los Angeles, and the person who made the said sale, and demanded of him that he execute such deed to this plaintiff; and which said tender of the said fee and demand for the said deed of the said John Burr were both made prior to the commencement of this action, and he, the said John Burr, did then and there refuse to make such or any conveyance of said property.

And the plaintiff herewith deposits the said sum of one
36 dollar and sixty cents ($1.60) the fee for the execution of the said deed with the clerk of this court, to be paid to the said W. A. Hammel or John Burr upon the execution of a deed to plaintiff for the said property.

XX.

Plaintiff is informed and believes, and therefore alleges the fact to be that the said check so delivered to the said John Burr was held by him until the term of his office expired and his successor was qualified, and that after the qualification of his successor the said John Burr endorsed the said check to the said defendant W. A. Hammel, by writing thereon: "Pay to the order of W. A. Hammel, sheriff," and signing the name of the said John Burr thereto as sheriff, and delivered the same to the said W. A. Hammel, and the said check is still held by the said sheriff.

And plaintiff further avers that he was not present at the time of the delivery of the said check to the said John Burr, and had no knowledge that the said payment had not been made in gold coin to the said sheriff, until informed thereof on the 17th day of November, 1899.

Wherefore, plaintiff prays judgment:

1. That the deed executed by the said defendant, W. A. Hammel to the said A. W. Rhodes be decreed to be void, and that the same be cancelled and annulled.

2. And that the court further decree that a deed be executed to this plaintiff by the said W. A. Hammel or the said John Burr, conveying the said property to this plaintiff under and in pursuance of the said sale so made by the said John Burr.

37 3. That in the meantime, and pending this action, the said A. W. Rhodes be enjoined and restrained from making any conveyance of the said property. And that it be further decreed that the said pretended redemption from the said sale by the said A. W. Rhodes was invalid and void, and that the same be cancelled, and that the said A. W. Rhodes has no right to redeem the said property from the said sale or any right to the conveyance thereof.

4. That it be further adjudged that the plaintiff recover of and from the said defendants, A. W. Rhodes and W. A. Hammel, two thousand five hundred ($2500.00) dollars as damages.

5. And that it be further adjudged that plaintiff recover of the defendants costs of suit, and for such other and further relief as may be just.

J. S. CHAPMAN,
Attorney for Plaintiff.

STATE OF CALIFORNIA, } ss:
County of Los Angeles. }

John D. Hooker, being duly sworn, deposes and says:

That he is the plaintiff in the foregoing amended complaint named, and has heard read the said amended complaint, and knows the contents thereof, and that the same is true of his own knowledge,

except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true.

JOHN D. HOOKER.

38 Subscribed and sworn to before me, this 17th day of November, 1899.

[SEAL.] WARD CHAPMAN,
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed Nov. 20, 1899. C. W. Bell, clerk; Frank Dominguez, deputy clerk.

Received copy of the within this 18th day of Nov., 1899.
E. C. BOWERS AND
ANDERSON & ANDERSON,
Attorneys for Def'ts.

(Title of Court and Cause.)

Answer to Amended Complaint.

Now comes the defendants, and file the following answer to the plaintiff's amended complaint herein, and allege:—

I.

Defendants deny that the plaintiff was entitled to a deed from said John Burr or from said W. A. Hammel, conveying to him the property described in the complaint, on the 13th day of December, 1898, or at any other time.

II.

Defendants deny that the claim upon which the judgment of E. R. Nichols was obtained against Anna P. Spencer was not a charge of any kind upon said property, but aver that it was a *bona fide* existing debt, and that said judgment became a lien upon the property described in the complaint and all the property of
39 said Anna P. Spencer upon the same being docketed on October 1st, 1897.

III.

Defendants deny that said Anna P. Spencer, prior to the docketing of said judgment executed to Charles G. Shepherd (or Charles J. Shepherd) a deed conveying to him all her right, title and interest in said property; and deny that any deed of said property to said Shepherd was recorded prior to the entry of said judgment.

IV.

Defendants deny that the said judgment of E. R. Nichols against said Anna P. Spencer was not duly given and made; and deny that said judgment was entered without authority; and deny that

said Anna P. Spencer was not the owner of the right, title, or interest in said property at the time said judgment was given. But aver that said Anna P. Spencer was the owner of said property at the time said judgment was docketed and thereafter; and deny that said judgment never became a lien upon said property described in the complaint. But aver that said judgment did become a lien upon the same being docketed. And deny that said A. W. Rhodes was not a redemptioner at the time he redeemed said property, and deny that the amount paid by him for said redemption was not sufficient. But aver that said redemption was made in good faith, said defendant Rhodes believing and being so advised by his attorney that the amount paid was sufficient and all that the law required as well as all that was required or demanded by the sheriff, to complete and perfect said redemption; and said defendant
40 here offers to pay any other and additional sums which may be necessary to complete said redemption, and hereby tenders the sum of $485.00 to be paid to said plaintiff to complete said redemption, should the same be necessary therefor.

V.

Defendants deny that the deed executed by W. A. Hammel, sheriff, to A. W. Rhodes was made without right or authority.

VI.

Defendants deny that said deed, executed by W. A. Hammel, sheriff, to said A. W. Rhodes, conveying to him said property, is illegal or void. And deny that said deed is a cloud upon any title of plaintiff to said property; and deny that plaintiff has any title or *intent* in said property.

VII.

Defendants deny that the money paid to John Burr for the purpose of redeeming said property has not been offered to the plaintiff.

VIII.

Defendants deny that plaintiff has been damaged $2500.00 or any other sum by the said making of said conveyance to said A. W. Rhodes.

IX.

Answering the matters set forth in paragraph XIX of said complaint, defendants allege that they have no information or belief as to the matters alleged therein, and on that ground deny the same, and further allege that the tender stated by plaintiff in said paragraph XIX to have been made to said W. A. Hammel,
41 sheriff of Los Angeles county, if made at all, was made by the said plaintiff subsequently to the going in to office of the said W. A. Hammel, and subsequently to the expiration of the term of office of said sheriff, John Burr, and further that said tender of said sum of $1.60 to said John Burr, mentioned in said paragraph

XIX, if made at all, was made subsequently to the expiration of the term of office of said John Burr, and subsequently to the execution of the deed of said premises to this defendant, Rhodes, as redemptioner, and as provided by law.

X.

Defendants answering the 9th paragraph of plaintiff's amended complaint, deny that the check was delivered to the sheriff on 12th day of December, 1898, but aver that the same was delivered to the sheriff on the 13th day of December, 1898; in the forenoon of said day; and further aver that at the time it was delivered the same was certified by the First National Bank of Los Angeles, California; and was what is generally known in commercial business as a certified check. Defendants deny that no other or different payment was made than by the check described in the amended complaint, but aver that said payment was made in a certified check as hereinbefore averred, which said check has been paid. And deny that said check was not payment, but aver that the same was payment, and further aver that at the time said check was drawn and delivered Clark & Bryan had more than $10,070.00 in gold coin of the United States to their credit at said bank; and that on the
42 13th day of December, 1898, before said certified check was delivered to said sheriff, defendants offered to pay said sheriff gold coin of the United States to the same amount to effect said redemption, and said sheriff informed defendants that he preferred that said payment be made in a certified check, and defendants thereupon had said check certified by said bank and delivered the same to said sheriff, as he had requested, and the same was accepted by said sheriff as such payment to effect said redemption. That said bank was solvent at the time said check was drawn and delivered, and has been solvent at all times since, and would have paid said check, in gold coin of the United States, at any time on demand. That it was the custom and business method of the sheriff at that time and before and since, to receive payment of redemptions in certified checks instead of gold coin, or other money.

—— ——.

—— ——.

For a further and separate answer defendants aver:

I.

That in April, 1895, said Anna P. Spencer referred to in paragraph X of the complaint, became indebted to said E. R. Nichols referred to in said complaint, and the same was a *bona fide* debt for a valuable consideration; and that in February, 1896, suit was commenced on said debt in the superior court of said county of Los Angeles, to-wit: No. —, in said court, which suit was dismissed about January 19th, 1897, by said An-a P. Spencer executing to said Nichols her promissory note for $875.00, besides interest, due 6
43 months after date; thereafter, to-wit: on the — day of August, 1897, suit was commenced in said superior court on said

note by said E. R. Nichols against said Anna P. Spencer in action No. 28,939 in said court; and judgment in said action was duly given and made in favor of said Nichols against said Spencer for $1015.00, which said judgment was docketed October 1st, 1897.

II.

That on the 7th day of December, 1898, said E. R. Nichols, in writing, duly assigned and transferred to defendant A. W. Rhodes, the said judgment mentioned in paragraph I of this answer, and at the time of said transfer the said judgment was valid, of full force and unpaid.

III.

That on the 1st day of June, 1897, and thereafter during the month of June, 1897, said Anna P. Spencer was also indebted to other persons besides said E. R. Nichols in various sums of money.

IV.

That while said debt on which judgment was obtained was a valid subsisting debt against said Anna P. Spencer, and while she was also indebted to other persons in various sums, defendants are informed and believe — upon said information and belief alleges, that said Anna P. Spencer fraudulently and with the intent to hinder, delay and defraud her creditors and the said E. R. Nichols, conveyed to one Orange E. Dickey all of the property she then owned, amounting in value to $150,000.00 or thereabouts, which conveyance included the property described in the complaint. That said
44 deed was executed by said Spencer to said Dickey without any valuable consideration. That on the same day, to-wit: June 10th, 1897, said Orange E. Dickey executed a deed to Charles J. Shepherd, purporting — convey*ing* all of said property to said Shepherd. That said Shepherd knew at the time said deed was executed to said Dickey that the said Anna P. Spencer was in debt, and that there was no valuable consideration paid said Spencer by said Dickey for said property. That there was no consideration for the deed from Dickey to Shepherd unless it be an indebtedness of about $2500.00 owing from said Spencer to said Shepherd, and some agreement on the part of said Shepherd to financially assist said Spencer in litigation in which she was then involved. But all of said obligations of said Spencer to said Shepherd were fully satisfied and discharged, so that said Shepherd had no claim to or interest in said property described in the complaint, when the sheriff's deed thereto was executed to defendant Rhodes. That the deed from Spencer to Dickey was placed on record at once, to wit: about June 10th, 1897, but the deed from Dickey to Shepherd was not placed on record until the 9th day of December, 1898. That on September 10th, 1897, said Dickey executed a deed to one T. L. Stiles purporting to convey to said Stiles a third interest in the property described in the complaint (and other property). That said deed from Dickey to Stiles was without any consideration, and was made with intent

to hinder and delay creditors of said Spencer. And it was made at the instance of said Spencer and by the consent of said Shep-
45 herd and said Spencer and said Shepherd, and Stiles all knew at the time it was made that it was without any consideration and for the purpose and with the intent to hinder and delay the creditors of said Spencer. That the deed from Dickey to Stiles was recorded about September 10th, 1897. That on October 5th, 1897, said Stiles conveyed by deed to said Shepherd, the property which said Dickey had conveyed to him; but the deed from Stiles to Shepherd was not recorded until December 9th, 1898. That there was no consideration for the deed from Stiles to Shepherd.

V.

That by said conveyance of said Anna P. Spencer to said Dickey, said Anna P. Spencer was left without any property appearing of record in her name, and without any property at all, except that included in said conveyance.

VI.

That after said conveyance was executed the said Anna P. Spencer remained in possession of all of said property by herself or tenants, and collected the rents from the same, until she was enjoined by the court, and exercised other acts of ownership over said property, and claimed the same, and on various occasions attempted to negotiate said property as her own with the knowledge of said Shepherd.

VII.

Defendants aver that said deed was fraudulent and void, and that the title to the property purporting to be conveyed thereby remained in said Anna P. Spencer, and that the title to said property was so vested on and after the 1st day of October, 1897.

46 VIII.

That after the transfer of said judgment to said A. W. Rhodes, said Rhodes was unable to find any property, and there was no property out of which said judgment could be satisfied except the property included in said deed of conveyance. And as said property mentioned in the complaint had been sold under a mortgage foreclosure, redemption thereof was the only manner in which he could recover his said debt.

For a further and separate answer, defendants aver:

Defendants here incorporate, adopt, and make paragraphs I and II of the 1st separate answer herein a part of this separate answer, and herein refer to the same as a part thereof.

II.

The defendants are informed and believe and on said information and belief allege, that on or about June 10th, 1897, said Anna P. Spencer was indebted to said Charles J. Shepherd in the sum of

about $2500.00, and that to secure the payment of said amount, and any other advances which said Shepherd might make to assist her in litigation in which she was then involved, she executed on June 10th, 1897, to one Orange E. Dickey, a deed of conveyance purporting to convey to him property to the value of about $150,000.00 which included the property described in the complaint, and which was all the property then owned by said Anna P. Spencer. That said deed was executed to said Dickey with the understanding that he should convey said property to said Charles J. Shepherd,
47 and that on the same day, to-wit; June 10th, 1897, said Dickey did execute a deed of conveyance of all of said property to said Charles J. Shepherd.

That there was no consideration for the deed of Anna P. Spencer to Orange E. Dickey, and the only consideration for the deed from said Dickey to said Shepherd was the agreement between said Shepherd and said Spencer that said Shepherd should be secured in a debt of about $2500.00 said Spencer owed him, and in further financial assistance he should render to said Spencer in matters of litigation in which she was then involved. That said Anna P. Spencer remained in possession of all of said property, collected the rents thereof, claimed the same as her own, and exercised acts of ownership over the same, from the time of the execution of said deed until October 1st, 1897, and thereafter.

ANDERSON & ANDERSON AND
E. C. BOWER,
(Per E. C. B.,) *Attorneys for Defendants.*

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

A. W. Rhodes being duly sworn, deposes and says that he is one of the defendants in the above entitled action and that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

A. W. RHODES.

48 Subscribed and sworn to before me this 10 day of April, 1900.

C. W. BELL, *Clerk,*
By C. G. KEYES, *Deputy.*

Endorsed: Filed April 11, 1900. C. W. Bell, clerk. By C. G. Keyes, deputy.

Rec'd copy of within answer to amended complaint this 10th day of April, 1900.

J. S. CHAPMAN,
Att'y for Pl't'f.

(Title of Court and Cause.)

Findings.

This cause having come on regularly for trial before Hon. M. T. Allen, judge of said court, on the 24th day of January, 1900, John S. Chapman, Esq., appearing for the plaintiff, and E. C. Bower and Messrs. Anderson & Anderson appearing for the defendants; the court having heard the evidence of the respective parties, the cause having been submitted to the court for decision, the court finds the following facts:

I.

That the judgment of E. R. Nichols *vs.* Anna P. Spencer, was duly given and made and was entered with authority, and was docketed on 1st day of October, 1897, and was duly assigned by the plaintiff therein to A. W. Rhodes prior to December 13th, 1898; and was a valid subsisting judgment on the 13th day of December, 1898.

49

II.

That upon the docketing of said judgment of E. R. Nichols *vs.* Anna P. Spencer, October 1st, 1897, said judgment became a lien upon the real estate described in the complaint in the above entitled action.

III.

That on the 10th day of June, 1897, Anna P. Spencer owed to Charles J. Shepherd about $2500.00; and that said relation of debtor and creditor continued after the 10th day of June, 1897.

IV.

That the deed from Anna P. Spencer to Orange E. Dickey, and the deed from Orange E. Dickey to Charles J. Shepherd, both dated June 10th, 1897, purporting to convey the property described in the complaint (and other property) were executed for the purpose of and intended as security to Charles J. Shepherd for the debt Anna P. Spencer then owed him and future advances to be made by him to her and on her account; and did not divest Anna P. Spencer of the title to said property; and that Anna P. Spencer owned an interest in said property on 1st day of October, 1897, and thereafter.

V.

That A. W. Rhodes was the owner of the judgment of E. R. Nichols *vs.* Anna P. Spencer on the 13th day of December, 1898, and was on that day, and prior thereto, a judgment creditor of said Anna P. Spencer; and was, on that day, a redemptioner of said property from the sale to plaintiff; and did on that day redeem said property from said sale.

50 VI.

That on the 13th day of December, 1898, A. W. Rhodes offered the sheriff $10,070.00 gold coin of the United States in payment of the redemption of said property.

VII.

That the check delivered by A. W. Rhodes to the sheriff in making said redemption has been paid.

VIII.

That on the 13th day of December, 1898, A. W. Rhodes, served upon the sheriff written notice of redemption of said property, (described in the complaint), together with a copy of the docket of the judgment under which he claimed the right to redeem, to-wit: the judgment of E. R. Nichols *vs.* Anna P. Spencer, certified by the county clerk of Los Angeles county, California; also a copy of the assignment assigning said judgment from E. R. Nichols to A. W. Rhodes, verified by the affidavit of A. W. Rhodes; also an affidavit of A. W. Rhodes showing that $1100.00 was then actually due on said judgment; also on said day he paid said sheriff $10,070.00 redemption money to redeem said property from the sale to plaintiff; that said amount was sufficient to effect said redemption and that thereafter on said day said sheriff issued to said Rhodes a certificate of redemption of said property; and thereafter executed to said Rhodes a deed conveying said property to him; and that said deed is not invalid.

IX.

That plaintiff was not damaged by reason of the sheriff making said conveyance to A. W. Rhodes.

51 *Conclusion of Law.*

And as conclusion of law from the foregoing facts, the court finds:

I.

That the plaintiff is entitled to no relief, and that he take nothing by said action.

II.

That the defendants recover costs.
Let judgment be entered accordingly.
This 11th day of April, 1900.

M. T. ALLEN,
Judge Superior Court.

Endorsed: Filed April 11th, 1900. C. W. Bell, clerk. By J. O. Lowe, deputy.

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial on the 24th day of January, 1900, before me, Hon. M. T. Allen, judge of said court, John S. Chapman, Esq., appearing for the plaintiff, and Anderson & Anderson and E. C. Bowers appearing for the defendants, and the cause having been submitted for decision, and the court having made his decision and findings therein in writing, which are filed:

Wherefore, by reason of the law and said decision, it is ordered, adjudged and decreed:

1st. That plaintiff take nothing by said action.

2nd. That the defendants recover of and from the plaintiff
52 their costs and disbursements herein expended, taxed at the sum of $—, and said defendants have execution for the same.

Done in open court this 11th day of April, 1900.

M. T. ALLEN,
Judge Superior Court.

Endorsed: Filed April 11, 1900. C. W. Bell, clerk. By J. O. Lowe, deputy.

Docketed April 12, 1900.

Entered April 12, 1900. Book 90, page 162. By D. S. Burson, Jr., deputy clerk.

(Title of Court and Cause.)

Notice of Appeal from Judgment.

To the defendants and their attorneys:

Notice is hereby given that the plaintiff in the above entitled action, John D. Hooker, hereby appeals to the supreme court of the State of California, from the judgment given and made herein and entered on the 12th day of April, 1900, in favor of the said defendants, John Burr, A. W. Rhodes and W. A. Hammel, and against the plaintiff, and from the whole of the said judgment.

J. S. CHAPMAN,
Attorney for Plaintiff.

June 9, 1900.

Endorsed: Filed June 9, 1900. C. W. Bell, clerk. By C. G. Keyes, deputy.

Received copy of the within notice this 9th day of June, 1900.

E. C. BOWERS AND
ANDERSON & ANDERSON,
Attorneys for Defendants.

53 (Title of Court and Cause.)

Plaintiff's Proposed Statement on Motion for a New Trial.

This cause was tried before the court without a jury, and the trial of the said action commenced on the 27th day of October, in 1899, and at the said trial the following proceedings were had and evidence taken:

At the commencement of the trial the plaintiff asked and was granted leave to file some amendments to the complaint, and the defendants, during the reading of the answer thereto, stated that they would like to file an amendment to the answer, making a tender to pay any additional sum which might be found to be needed; and the counsel for the plaintiff consented that they might do so, but without admitting the materiality of it. At the same time it was stated by the counsel for the defendants, that they presumed that the amendment to the complaint would necessitate some little amendment to the answer denying the evidence of the title, and the vesting of the title of the property in Dickey and Shepherd, as alleged in the amendment to the complaint, and which they could make; and the counsel for the plaintiff consented that those denials be considered to be in.

It was then stipulated that Ambrose H. Spencer and Anna P. Spencer were husband and wife, and that in the year 1887 the property in controversy was conveyed to Anna P. Spencer, the wife of Ambrose H. Spencer, and the property stood of record in the
54 name of Anna P. Spencer. And on the 16th of October, 1893, Anna P. Spencer and Ambrose H. Spencer, her husband, executed a mortgage to Jacob Swiggart, and a note for the sum of five thousand dollars, both bearing date the 16th of October, 1893, the mortgage being given to secure the payment of that note; and that the property mortgaged was the same as that described in the complaint in this action. That afterwards, and before the commencement of the suit to recover the money and to foreclose the mortgage, Swiggart assigned the note and mortgage to Charles R. Bishop. That Bishop commenced a suit in the superior court of the county of Los Angeles, to recover the amount due on that promissory note and foreclose the mortgage, and that suit was brought against Frank M. Kelsey, administrator of the estate of Ambrose H. Spencer (who had in the meantime died), Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, Isabel Spencer, John Doe, Richard Roe and Jane Doe, to recover the amount due. And it was admitted that there was no denial of the allegations, in the complaint, as to the judgment, and the sale made on the 13th day of June, 1898, in that foreclosure suit. And it was stipulated that the allegation in the amendment to the complaint, filed on the day the trial commenced, setting forth the record of the mortgage in the office of the county recorder of Los Angeles county on the 16th day of October, 1893, would not be denied. The plaintiff introduced in evidence the deed of Anna P. Spencer to Orange E. Dickey, on the 10th day of June, 1897. It was

the usual form of a grant, bargain and sale deed, reciting a
55 consideration of $10,000; and it was alleged by both parties that the judgment in favor of Nichols in action No. 28,939 in the superior court was docketed October 1, 1897, and is the judgment under which the redemption proceedings were taken, the judgment having been before the attempted redemption, assigned to the defendant Rhodes.

JOHN D. HOOKER, the plaintiff, was then called as a witness in his own behalf, and being duly sworn, testified:

Am the plaintiff in the action. Have heard something of the payment of this money by the defendant Rhodes to the sheriff of this county in an attempted redemption proceedings from the sale at which I was the purchaser.

Q. When, where, and by whom were you ever offered that money, if you were offered it at all?

A. Nobody ever offered it to me. Someone called me up over the phone, and said there was some money at the sheriff's office I could have if I came and got it; I don't know who it was. Have never received any of the rents or profits of that property; I don't know what the rents are.

Cross-examination:

I don't know Mr. Rhodes; I never saw him to know him. I don't remember that about the time that redemption was made, or a little prior to that time, of Mr. Rhodes coming to my place to see me. I don't remember about making any engagement to meet him at my place. There was no such engagement that I know of.
56 The witness here asks: "Is Mr. Rhodes in the room?" Mr. Rhodes is pointed out by the counsel for the defendant, who was cross-examining witness, Mr. Bower, and the witness upon looking at Mr. Rhodes then answered "No, sir." I did not get a telephonic message from anybody purporting to be Mr. Rhodes, that he would meet me at a certain hour at my place of business in regard to this matter. I may have had a telephonic message that a certain person would meet me, because I frequently have, but I have no recollection of Mr. Rhodes saying anything of the kind. I do not know that I got such a telephonic message from anybody; I have no recollection of any such message to meet him in regard to this matter. I do not think I got anything of the kind. I have no recollection of any telephonic message that some person would meet me at my office in regard to a redemption of this property. The only telephone message I got about the matter, I have spoken to you about. If Mr. Rhodes telephoned to the office, we have clerks there to receive the messages, and he might have conversed with the clerk, for all I know, but not with me, nor did my clerk inform me of it that I know of.

Q. Who was your clerk at that time.

A. I have got a dozen. The typewriter takes the telephone messages. I cannot now give you the name of the typewriter at that

time, but she is now in New York. I don't remember answering any such a message myself. I can get the typewriter's name if you like. None of my clerks ever informed me that Mr. Rhodes had called on me in regard to this matter, to my recollection.

57 Q. Did you have any knowledge that Mr. Rhodes went out to your house with this money to see you in regard to making this redemption?

A. I have knowledge of it now.

Q. Well, when did you first have any knowledge of that, Mr. Hooker?

A. Well, it seems to me that Mr. Rhodes and Mr. Clark or somebody else, got some money from the First national bank, as I understood afterwards—this I didn't know—and they rode out to my house to see me. I was not at home, and afterwards I learned that they had taken the money through the bank, from the bank office, and understood——

And here the counsel for the plaintiff objected to the testimony as to what he heard afterwards as incompetent, irrelevant and immaterial.

Mr. BOWERS: It is proper cross-examination. He was asked if he had ever been offered that money, and now we are showing that offers were made.

The COURT: Are you showing that, or are you not seeking to show that someone went to his house for the purpose of making an offer and did not do it?

Mr. BOWERS: Yes, sir; that was not my question though, your honor. He was simply stating how he arrived at that knowledge.

Then counsel puts the following question:

"Did you have any knowledge of it, Mr. Hooker, at the time Mr. Rhodes was down there?"

A. No, sir; I was not at home that night. I was at Mr. Stewart's; dined there. I do not remember how long afterwards it was that I was informed that Mr. Rhodes was down there that night to deliver that money; it might have been soon, say two weeks.

58 Q. Did the sheriff ever make any offer to you of the money that was to be paid over to redeem the property?

A. Never; I don't know the sheriff; never saw him. My attorney never to my knowledge informed me that the money was there, and that it had been offered to him for me, or that the sheriff had offered the money to me through my attorney, Judge Chapman. The money that was to be paid over to redeem the property was never offered to me, and never spoke to me anything about it.

By the COURT: The question is: Did your attorney ever notify you that he had been tendered the redemption money himself?

A. No, sir.

Question by Mr. BOWER: The sheriff, nor Judge Chapman, nor nobody else ever spoke to you about that money?

A. Why never is a long time, you mean prior to this business?

Q. I mean about the time of that redemption.

A. The witness shook his head negatively.

Question by the COURT: Nowheres along about that time?

A. No, not until after it had expired, and we sought to get the deed. I was not spoken to about that money, nor had a knowledge that the money was there and was offered to me there by the sheriff or through Judge Chapman from the sheriff. I had no knowledge about the money being there, not of my own knowledge before I commenced the suit. Of course, I was informed that it was
59 there. I wanted the deed and I found I could not get it, and I went to Judge Chapman to take him the sheriff's certificate, and told him I wanted that deed. I was not informed before I applied for a deed that the money was there except by the phone. I don't know who telephoned me. That information was given the day, or the day before it elapsed, that is, before the six months elapsed. I don't know who the message purported to come from. If they said who was talking to me, I don't recollect it.

Q. Did the message inform you that the money was there?

A. Said my money was there, and I could come and get it if I wanted it.

—. Where?

A. Sheriff—I suppose the sheriff's office.

Q. Now what time was that?

By the COURT:

A. He said the day or the day preceding the expiration of the six months redemption.

It was here admitted that the plaintiff did tender the $1.60 for the deed, as alleged in the complaint, and made a demand for the deed. It was on the day before the complaint was filed or the same day, and a demand was made upon both sheriffs, and it was admitted that the tender to the sheriff and his predecessor was made either the day before the commencement of the proceeding, or the same day, and before the action was commenced.

J. S. Chapman, Esq., attorney for plaintiff, made a statement to the court; to which Mr. Denis, one of the attorneys for defendants, replied. Said statement and reply being as follows:

60 "Mr. CHAPMAN: Now, I would like to make another statement in connection with it. Mr. Denis is here and will correct me in so far as I am wrong. He and I had been discussing the question of a compromise of this matter, and I had been brought certain evidence that had been given by Mr. Shepherd and Mrs. Spencer in a proceeding pending here in court for my examination, and I examined it, and after we had met two or three times on the subject, and the last time that we did meet, or the last but one before the suit was commenced, he told me that the parties did not then desire a compromise, and I talked with him then about making up a case to submit to the court, in which we would agree upon the facts in the matter as far as we would, and have it settled and determined. I went away—in that conversation there was nothing said, so far as I can remember, by either one of us, about allowing things to remain *in statu quo*, but I went away to San Francisco a day or two

afterwards, and when I came back this deed had been made. I saw Mr. Denis about it afterwards, and he said he didn't understand that there was anything in that conversation that implied that they wouldn't obtain the deed, or anything of that kind. And all I desire to make proof of is, or to show why I didn't make the demand for the deed before. If I am incorrect about any of it, Mr. Denis—— "

"Mr. DENIS: Yes, sir, I think you are. This testimony was taken, the testimony of Mr. Shepherd and Mrs. Spencer, I think in November, you have it here, and a copy of that was made at my instance to take to Mr. Chapman, in order to indicate to him
61 that it was advisable, from our standpoint, that he should have his clients accept the redemption of Rhodes. That must have been in December, nearly three months before the filing of this complaint; consequently there was never in my mind, certainly, any idea that we were discussing a suit which not only was not brought, but which I confidently expected never would be brought."

"The COURT: I don't understand from his statement that this talk was with you compromising this suit.

"Mr. DENIS: Yes, that was the only talk that we had.

"The COURT: No, he stated about a talk of settling your differences.

"Mr. DENIS: Compromising the matters out of which this suit has grown; that is to say, we represented Rhodes, he represented Mr. Hooker, the purchaser at the sale; Rhodes being a redemptioner and having made this redemption from the Hooker purchase, we wanted Mr. Chapman to induce his client to take the redemption money. There was talk by me as one of the counsel, with Mr. Chapman, that Mr. Hooker should pay a certain bonus to us—pay us a certain amount, and that we would draw down our money and Mr. Hooker could keep the lot. In one of the interviews that was seriously discussed by us, but nothing came of it, for the reason that our client declined to take any money, but wanted the lot. As to the procuring of the deed from the sheriff, that is a matter with which I had nothing to do and knew nothing of. I didn't know that the deed was to be applied for by Mr. Rhodes to the
62 sheriff, and that deed was procured to my absolute ignorance, but if it had been by my knowledge and procurement there was nothing in any conversation of Mr. Chapman's and mine that squinted at——

"The COURT: Mr. Chapman says there wasn't anything said or any agreement between you of inaction, but that he got the impression that nothing would be done, and hence he didn't make a tender.

"Mr. DENIS: Of course, he may have gotten that impression, but I don't know why he should, because in the last interview we had the whole talk of compromise was off.

"The COURT: He doesn't say he got it from anything you said, but he says he assumes in view of your talk——

"Mr. DENIS: Of course, Mr. Chapman's statement of his impressions may be perfectly correct, but I am sure that our last talk before his going to San Francisco was calling off the whole thing. That is true, isn't it?

"Mr. CHAPMAN: Yes, sir.

"The COURT: Judge Chapman says the reason why he did not take any action before the execution of this deed was for the reason that he supposed that no deed would go out until after his return from San Francisco. That is about it.

"Mr. CHAPMAN: The impression I got from the last conversation that I had with Mr. Denis before this suit was brought or the last but one, I don't know which, was that we would bring this suit, or make up the case as far as we could agree, to determine which
63 of us should be entitled to it. As I said before, there was nothing said by either one of us that we wouldn't take out a deed. Nor have I mentioned this as a reproach to him at all, but simply that I didn't make the application to the sheriff for the deed because we were trying to compromise, and we were then going, as I supposed, to make up the case.

"The COURT: I understand, you simply inferred——

"Mr. DENIS: That is exactly it. We had several interviews looking to a compromise. The last one, however, resulted in my stating to Mr. Chapman that my client wouldn't take any money, but would keep the lot.

"The taking of this evidence, I see, was for December 16, and postponed from time to time until the 28th, at which time I think they took it.

"Mr. DENIS: And it was given to you within three or four days after it was taken, and our talk lasted over ten days or two weeks. This suit was filed two months later.

"Mr. CHAPMAN: More than two weeks, because I went to San Francisco in February."

Mr. Bower then asks Mr. Chapman the following questions, the counsel waiving the administering of an oath:

Q. How long before you went to San Francisco was the last conversation you had with Mr. Denis on that subject?

A. I think within two or three or four days.

Q. Do you know when that money was paid up there to make this redemption?

A. Well, I read the whole redemption proceedings through, and I think it was on the 12th of December. Of course I was
64 not personally present when the money was put up, and don't know of my own knowledge that it was ever put up, but I understood it to be there; and I went up there and went through the redemption proceedings, and my recollection is that the date is the 12th day of December, 1898.

Q. Did these conversations you had with Mr. Denis occur prior or subsequent to the 12th day of December?

A. Oh, they were subsequent to the 12th. There was no controversy with anybody until after this redemption proceeding was

taken, nor did I look into the proceedings until it seems to me it must have been two weeks after the money was deposited before I went there and went through the proceedings.

Q. The money was offered to you for Mr. Hooker, wasn't it, offered to you as the attorney for Mr. Hooker?

A. I will have to tell you all I can remember about it. Perhaps it would hardly be proper for me to say whether it was an offer. I understood the money to be there, and that the fight was on. That is what took me up there to examine these proceedings; and when I was in the sheriff's office, some one of the officers, either the sheriff himself or a deputy—I am pretty sure it was a deputy—told me that the money was there, and of course I understood I could take it if I desired to take it, but just exactly what he said I do not know beyond simply he informed me that the money was there.

Q. Do you remember what day that was?

65 A. Well, as I said before, I think I was there not later than two weeks after the money was put up, and it may have been within ten days. And it seems to me also I got a telephonic message from the sheriff's office before the time I was examining these papers and—two or three days before—in which I was told that they had been referred to me on the subject by Mr. Hooker, but the matter had not then been referred to me, as I remember it. I think that was within two or three days after the money was put up that I got that telephonic message. In a short time after that I was spoken to by Mr. Hooker, and I went up there and went through all the papers in the Nichols judgments and the Bishop judgments, and the redemptions.

Q. You were informed then from about the time the money was paid there and knew it had been offered—that is, had sufficient information to presume it was there until after the deed was made?

A. I knew it to my own satisfaction. Of course I would not have been rummaging in the papers getting ready for a suit if I had not supposed it was there.

Q. And did you inform Mr. Hooker that the money was there?

A. I don't think I did any other way than that Mr. Hooker and I were talking about the business assumed it. I think Mr. Hooker got his telephonic message before I heard anything at all about it, probably two or three days before, and then he and I talked about it, then a week or ten days, about what was to be done, and I went and looked the matter up.

Q. And during the whole time and up to the time the deed was executed by the sheriff, you nor Mr. Hooker to your knowl-

66 edge made any protest or objection to receiving the money, or to the deed being executed?

A. Oh yes we did.

Q. In what manner and how?

A. By going there—when the sheriff was talking with me about it, I told him that Mr. Hooker was entitled to that deed, and that I was commencing—in fact I was in his office examining into it at the time he told me this—I do not mean at the time the telephonic message. I have an impression that I got a telephonic message from

the sheriff's office before I went there on this trip that I speak of when I was looking into the foundation of the facts of the case. No, I was there for the purpose of getting ready for the controversy at the time and only time that I had ever talked with him, except the day that I demanded the deed and tendered the money.

Question by the COURT: The question he asked is: Did you notify the sheriff that Mr. Hooker would not accept that money?

A. To say that I did in terms, your honor, I do not think I could but if I am not mightily mistaken, we were all taking it for granted that there was a controversy and I was getting up a suit over it.

Question by Mr. BOWERS: Isn't it a fact that in your conversations with the sheriff, that you neither declined, nor agreed to accept it, that you treated it passively, without deciding or stating or saying what you would do; that you just passed the matter over as far as the sheriff is concerned?

A. That is true in a sense, but if it implies that the sheriff
67 ever offered me the money, that is not correct. He never offered it to me; I never saw a dollar of it. There was no tender, nor anything except that I understood in some language, which I could not speak, but I understood it all right, that the money was there.

Q. He told you it was there for Mr. Hooker, didn't he?

A. I think so. If he didn't say: "The money is here for Mr. Hooker," he said something that was the equivalent—that I understood to mean that; and I had that understanding, that the money was there for Hooker. I don't know as the sheriff could give me the money, but if Hooker would go there after it, he would get it. I cannot state just what he said, but I know that is the understanding I had of it.

Q. Well, that status and condition remained for about two months, didn't it?

A. Well, I suppose it remains yet, but I do not know.

Q. I mean without the deed being made, the status and condition then remained, before the time the deed was made?

A. That deed was made the 18th of February, wasn't it?

Q. About that time.

A. Well I should say it was as early as two months before that that I was apprised of the fact that the money was there.

Q. Now, during that whole time, neither you nor Mr. Hooker made any protest against the sheriff making the deed to Mr Rhodes, nor applied for a deed for Mr. Hooker?

68 A. If you mean a formal protest, I didn't; but as I said before, I was getting ready for a fight all the time to be commenced or to compromise. This was before these depositions were taken, and I then held up in the matter until after various propositions *pro* and *con*. Until it was stated to me that these people did not desire to compromise at all. Then I took it up again.

WESLEY CLARK, called on behalf of the plaintiff, and first sworn, testified as follows:

I am a real estate agent; I know all the property in controversy here. I suppose the rental value of the property would probably be $30 to $35 a month, and I presume that has been the case for the last ten months.

Mr. HOOKER, recalled for cross-examination by Mr. Denis, and testified:

I know Mr. G. W. Hughes, and knew him in 1898. Have known him for ten years. He has no interest in the property in controversy here, and never had one dollar's interest in it.

The purpose of these questions was to lay the foundation for showing that Hughes, in the event that he had any interest, did have knowledge that the money was put up. Plaintiff's attorney remarked: We are not denying we had satisfactory information a short time after it was put up, that it was put up. And the court remarked:

" If you gentlemen do not care to take up any more time and are satisfied with the record, I can say to you I am satisfied that
69 Mr. Hooker had knowledge of such facts as would convey to him the information and in two or three days after the redemption that it had been deposited.

Mr. DENIS: That is all that is necessary, your honor.

The COURT: I think there can be no serious controversy, Judge Chapman, about that.

Mr. CHAPMAN: Not at all. He had knowledge enough to come and employ an attorney in the matter.

The plaintiff then introduced in evidence the deed from Orange E. Dickey and Manuela Dickey to T. L. Stiles, of date September 10, 1897, recorded the same day in Book 1179, page 50, of deeds, reciting a consideration of $10,000, and purporting to grant, bargain and sell an undivided one-third interest in this same property. Also a deed from Orange E. Dickey and Manuela Dickey, his wife, to Charles J. Shepherd, dated June 10, 1897, recorded December 12, 1898, at 1.20 p. m. And a deed from Stiles and wife to Charles J. Shepherd of date October 5, 1897, recorded in Book 1259, page 309, and recorded on December 12, 1898. That was a quitclaim deed of the same property and recited a consideration of one dollar.

It was admitted that no deed had ever been made by the sheriff to Mr. Hooker, and the plaintiff rested.

JOHN M. BONNER was called as a witness for the defendant, and being duly sworn, testified as follows:

I reside in New Orleans, Louisiana. Haven't got any business just now; used to be an attorney; practiced law some forty
70 odd years in New Orleans. I was here in Los Angeles from the 28th of June to the 3rd of November, 1898. I never met Orange E. Dickey but once, and I called to see him at his place of business at Mr. Charles J. Shepherd's office. I met Mr. Shepherd

twice during the year 1898. He came to see me at the California Club on both occasions. I don't remember just what day I met Dickey; somewhere about the 20th of September, I think it was '98.

Q. Did you have any conversations with Mr. Dickey at that time about the time or the property that was conveyed or property to be conveyed by Mrs. Spencer to Dickey?

Mr. CHAPMAN: Now, you are asked simply whether you had any such conversation?

A. Well the conversation I had with Mr. Dickey was a very short one.

Mr. ANDERSON: Well, did you have any conversation with Mr. Dickey at all about that property?

A. Yes.

Q. State what it was.

The counsel for the defendant here objected to the testimony upon the ground that it was irrelevant, immaterial and incompetent. That the conversation purported to have taken place sometime in the fall of 1898 after Mrs. Spencer had made this deed to Dickey and after Mr. Hooker had purchased at the sheriff's sale, and that the testimony was not competent.

The COURT: I think the speedier way to solve the matter is to hear these matters before the court, reserving your exceptions and objections, and let the court pass upon it with the case.

71 And it was here understood that the objection went to the relevancy and immateriality and incompetency of all evidence of declarations concerning the title to this property after the making of the deed by Mrs. Spencer and after the sale to Mr. Hooker, and the evidence will be received, subject to the objection and the ruling reserved.

The witness is then asked to state what that conversation was, and answered as follows:

I went to see Mr. Dickey. I found out from examination of the records that Mrs. Spencer had conveyed a large amount of property to Mr. Dickey. After some thirty days, I think, there was a judgment of court entered directing her to make a conveyance to the plaintiffs in a certain case of a certain proportion of the interest in that property. I had bought the interest of a savings bank here in a piece of property where they had bought at foreclosure sale. The bank transferred it to me without any bonus or profit, and at the time I took it I was under the impression that it would not be redeemed. Efforts had been made by the judgment debtor to raise the money and had failed. Much to my surprise, in less than thirty days after I bought it, the property was redeemed on me. Well, I had that money on hand here in Los Angeles. In the meantime parties suggested to me the propriety of redeeming property that had been sold in the Spencer matter. I did not care to go into another venture with the same results that had happened to me in the last matter, so I went to see Mr. Dickey, and told him exactly what I wanted. I wanted to know whether he was going to redeem the

property or not. He told me himself that he was not going to
72 redeem it. Then he said to me that I had better see Mr. Shepherd; that Mr. Shepherd was the party for me to see. "Well," I said, "where is Mr. Shepherd?" and he told me he was out. "Well," said I, "would it be inconvenient for Mr. Shepherd to call on me at the California Club?" He said no, Mr. Shepherd would take pleasure in calling on me. Well, a day or two afterwards—Mr. Shepherd did not keep the first appointment, but he did keep the second appointment, he made a call on me. I told Mr. Shepherd exactly what I wanted; told him that parties had spoken to me with a view of redeeming this property, and I wanted, before I said anything to him, to put him on his guard, and our conversation was very frank and very straightforward. Mr. Shepherd told me that he held the property for Mrs. Spencer; that his object was to protect Mrs. Spencer; that he was not the owner of the property himself; that he had put up certain money, and that he wanted to secure the money he had advanced for Mrs. Spencer, and said to me: "I want you to meet Mr. Lamme; Mr. Lamme is Mrs. Spencer's attorney, and says he, I am not authorized to make any proposition to you. I would like very much to have you redeem it, and he—I told him after our conversation that I did not think it was necessary for me to see Mr. Lamme, but he insisted on it. "Well," I said, "I have no objection and would like very much to meet Mr. Lamme and form his acquaintance." So Mr. Shepherd made an appointment for Mr. Lamme to come and see me at the California Club;
and Mr. Lamme came to talk to me, and said that Mrs.
73 Spencer owned the property, and that he wanted to make arrangements with me to redeem it, and proposed certain terms for redemption.

Counsel for the plaintiff here said: Now this objection is understood to go to any statement that Mr. Lamme may have made or anybody else.

Mr. ANDERSON: Yes.

Q. Counsel for the defendants then asked the witness whether he had reported back to Mr. Shepherd the conversation that he had with Mr. Lamme.

A. Mr. Shepherd came to see me a day or two after Mr. Lamme called, and I told Mr. Shepherd what Mr. Lamme had said, and that I had declined to accede to his proposition, and told Mr. Shepherd what the proposition was, and Mr. Shepherd seemed to be very much put out, and said that the parties had wanted him to put up $40,000 to redeem it, and he didn't want to do it; and the second conversation was a very short one. I have heard of the deed referred to here as the deed of June 10, 1897, made by Mrs. Spencer to Mr. Dickey. It was concerning the property described in that deed that I was talking about. I looked through the records in the court-house and went to the recorder's office and examined the deed on the record myself.

Q. Did Mr. Shepherd make any statements to you as to the amount of money he had advanced to Mrs. Spencer at that time?

A. I understood him to say about $800 or a thousand dollars. The terms that Mr. Lamme proposed to me and which I reported to Mr. Shepherd were to pay me 7 per cent. interest for the money, and 10 per cent. of the profits after the property was sold, I to
74 have nothing to do with the selling of the property, it to be left to Mrs. Spencer.

Q. And who was to receive the other 90 per cent.?

A. I understood him Mrs. Spencer. I got that understanding from both Mr. Shepherd and Mr. Lamme. That was the proposition I told Mr. Shepherd that Lamme had made. I had told Shepherd before he asked me to see Mr. Lamme I didn't think it was worth while for me to see Mr. Lamme, because I had been spoken to by other parties. At the time I spoke to Mr. Dickey, there was nothing said with reference to his interest in the property, only he said he was not going to redeem it, for me to see Mr. Shepherd. He said first straight out that he himself was not going to redeem it, and then after an interval of a moment he said I had better see Mr. Shepherd, he was the party for me to see in the matter.

Cross-examination:

Q. When you called to see Mr. Shepherd——

A. I didn't go to see Mr. Shepherd, he came to see me at the California club. When I saw him, he told me that he held that property to protect Mrs. Spencer.

Q. Did he say anything about how he expected to protect her?

A. No, not that I remember.

Q. The deal in which you were engaged, Judge Bonner, was the redemption of this whole Spencer property from the various sales which had been made?

75 A. I was not at that time engaged in anything; I was only contemplating a deal.

Q. Well, the thing that you were contemplating, was that——

A. Well, I never contemplated going into anything but the redemption of the acreage property. I refer to the lot out on San Pedro street, about 84 to 87 acres. I was approached in regard to that by Mr. Wesley Clark, of Clark & Bryan. They suggested my redeeming the entire property. I said no, I did not care about putting up—tying up so much money as to take in the whole. The only thing I would entertain at all would be the redemption of the acreage property, and the amount of money that would be required to do that would be about $30,000. This deed to Dickey—and the property that Shepherd was dealing with was included—that acreage property and all of the rest of the property that had been sold in the one deal. I do not think he said how he was going to secure Mrs. Spencer.

Q. He just simply said he——

A. That he was Mrs. Spencer's friend; that he was just helping Mrs. Spencer in the matter. He repeated that a half dozen times in the first conversation.

Q. And notwithstanding this deed to him that she still had some interest?

A. I didn't know anything about the deed to him at that time.

Q. I mean the deed to Dickey.

A. Yes, because there was no deed to Mr. Shepherd at the
76 time of our conversation on record. The deed was in the name of Mr. Dickey whom I understood to be a clerk of Mr. Shepherd, and he had referred me to Shepherd, and that is the way I came to see him.

Q. I will ask you again, if he did in that conversation make any statement to you concerning the means by which he proposed to secure Mrs. Spencer?

A. No, because that matter was not discussed. I didn't ask him anything about it. That acreage property was sold for $28,000, and I think my calculations showed that it would take over $30,000 to redeem it. There would have been some incidental expenses, and what they were I do not know, because I dropped the whole matter afterwards and did not follow out the details.

Q. Now, at the time that you were following the details, your object was to make the redemption of that acreage property?

A. My object was to find out whether Mrs. Spencer had the interest in it that would justify me to redeem it under a judgment. That was the object of my investigations, whether Mrs. Spencer was the actual, though not the record owner of the property.

Q. What did you want to know that for?

A. Well, if Dickey was the virtual owner I could not have redeemed it under judgment against Mrs. Spencer. That don't require any discussion. I was proposing to redeem it under a judgment against Mrs. Spencer. I didn't have any judgment against her, but I knew I could control some judgments. I learned that from Mr. Clark and Bryan.

77 Q. When you ascertained from Dickey, or when you were referred to Shepherd and he told you——

A. Now, Mr. Shepherd and I took it for granted that the whole thing was fraud from the fact when I saw a judgment entered against Mrs. Spencer ordering her to convey a certain proportion of that property.

Q. Now I will ask you again, and I wish *you about* your opinion upon this transaction. Are you an attorney at law?

A. I have been for a period of forty years in New Orleans.

Q. Now I will ask you again, and I wish you would confine yourself to answer my questions. When you went to Mr. Shepherd——

A. I didn't go to Mr. Shepherd, I tell you again.

Q. Well, you met him?

A. Well, he came to see me. When I saw him he referred me to Lamme.

Q. And did he tell you then that his interest there was that he was holding the property for Mrs. Spencer?

A. Yes, he was a friend of Mrs. Spencer, and he was trying to help Mrs. Spencer and protect Mrs. Spencer.

Q. Well, didn't he tell you that he held the property for her?

A. Well, at that time, yes.

Q. At that time you knew nothing of Shepherd's holding it at all so far as the records are concerned?

A. From the fact that Mr. Dickey being the record owner
78 and being the bookkeeper of Mr. Shepherd and his referring me to Mr. Shepherd, I naturally concluded Mr. Shepherd was the party for me to see.

Q. Well, you were told that he was the party for you to see?

A. Mr. Dickey told me so; who was the record owner himself, and I didn't want any better authority than Mr. Dickey. Mr. Shepherd told me that he was holding the property for Mrs. Spencer a half a dozen times. I did not inquire of him as to how he was holding it. That is the third time you have asked me that question, and I have denied it for the third time.

Q. And I believe you have denied several times that he told you anything about how he proposed to secure her by holding this——

A. That matter was never discussed, sir. It was not necessary for my purpose to discuss a question of that kind. He referred me to Judge Lamme as Mrs. Spencer's attorney and accredited agent.

Q. Did he say that?

A. Yes.

Q. You went down and saw Judge Lamme?

A. No, I didn't; Judge Lamme came to see me, and I had a talk with him and he made the proposition to me that I was to redeem the property, and get the money back with 7 per cent. per annum, and 10 per cent. profits when the property was sold, and I communicated that to Mr. Shepherd. In that conversation with Mr. Lamme, the contract which was to be made in the event that we made any deal was not discussed at all. It was not necessary to discuss it, because I did not accede to the terms.

Q. Did you testify a little while ago that you were not to
79 have anything to say about the selling of the property?

A. That was Lamme's proposition, that Mrs. Spencer was to have the disposition of the property, and after it was sold I was to get 10 per cent. of the proceeds. My deposition was taken a short time ago in this matter.

Question by the COURT: I wanted to know, Judge Bonner, when did this conversation occur in which you say Mr. Shepherd said that he had advanced $800 or a $1000, and wanted his money out of it.

A. In the reception room of the California Club at the first interview. The last interview in which he found out the result of the meeting of Mr. Lamme and myself was very short.

Question by Mr. CHAPMAN: Did you in that deposition testify as follows:

Q. State what took place at that conversation referring to the conversation with Shepherd at the California Club?

A. I told him why I had gone to see Mr. Dickey, and then Mr. Shepherd told me in the conversation that he did not want to redeem the property himself; that the property did not belong to him; that he was simply holding it as a trustee for Mrs. Spencer,

and said that he himself could not make any arrangements with me upon the terms of redemption, but was very anxious that I should redeem it, and asked me to see Mr. Lamme, who was Mrs. Spencer's attorney.

A. Anxious that I should see.

Q. Was very anxious that you should redeem it?

A. Yes, sir.

80 Still reading from the deposition:

He made an appointment for me to meet Mr. Lamme, and in pursuance of that appointment Mr. Lamme called on me at the California Club. I did so testify.

Question was read from the witness's deposition to the following effect:

Q. State whether or not in talking, Mr. Shepherd made any statements to you as to the terms upon which he held this property?

A. He said that he was holding it as a trustee for Mrs. Spencer; that all he wanted was to secure himself for certain moneys he had advanced to Mrs. Spencer. That he didn't want to get any more out of it. When Mr. Lamme came to see me we talked the matter over.

Q. Did you so testify?

A. If it is down there I did, sir, and that is true. I testified in that deposition that Mr. Lamme and myself had a good, long conversation, and he proposed terms of redemption that I would not consent to at all. That he purported to act for Mrs. Spencer as her attorney at the request and instance of Mr. Shepherd. That when I was talking to Shepherd the property that I referred to was certain real estate in the city of Los Angeles, and a piece of acreage out on the south end of the city, and the same that was included in the deed to Orange Dickey. I further testified that after my interview with Mr. Lamme, Mr. Shepherd came to see me the second time. The first conversation with Shepherd occurred not far from the 20th of September, 1898. I saw Mr. Shepherd the

81 second time the same week. The first meeting we had was I think, on Thursday. Mr. Lamme came to see me the next day, Friday, and then two or three days after, Mr. Lamme came to see me, Mr. Shepherd came a second time, and asked me if I had seen Lamme. I told him exactly what had occurred between Mr. Lamme and myself; recited the terms that Mr. Lamme proposed to me, and I told Mr. Shepherd that they were not at all satisfactory to me, and I would not think of redeeming on the terms Mr. Lamme had proposed to me, and when I stated the terms to Mr. Shepherd, he agreed with me that Mr. Lamme ought to have been more liberal. Thereupon Mr. Shepherd stated that they wanted him to put up $40,000 for the purpose of redeeming it, but he did not feel inclined to do it. That Mr. Shepherd's mode of redemption was not discussed I never talked with him about it. All that was said in that conversation was that they had asked him to put up $40,000 and he didn't feel inclined to do it.

Q. Didn't you know that he was requested to redeem it as the successor in interest of Mrs. Spencer?

A. I didn't know anything about it, because the thing was not discussed, but now that you mention that, that was one of the reasons why I did not want to accept. Would not have accepted Mr. Lamme's proposition, because I was afraid of that suit that Mrs. Spencer had appealed from.

Q. Why were you afraid of it?

A. Well, because the judge had rendered an unlimited and unqualified judgment against her. I refer to the suit by Isabella Spencer and James Spencer against Mrs. Anna P. Spencer.

82 I looked at the record and I thought that the judgment had not ought to have been.

Q. Wherein they charge that she had obtained deeds to this property through undue influence from her husband, Ambrose H. Spencer?

A. Yes, sir. Judge Van Dyke had delivered a decision in which he sustained those allegations, and said these people had an interest in it, that is the judgment I was afraid of.

Witness now has read to him further from the deposition:

"Q. When you say redeeming it, to what did he refer?

"A. He referred to the redeeming of the property contained in the Dickey deed, or which had been sold under foreclosure. There had been two different foreclosure sales, and the property was enumerated; some on Broadway; some on Spring; some running from Spring through to Main, and I think there was a piece on Olive street, and 84 acres of ranch property.

"Q. Do you know the property that is involved in this controversy here?

"A. I only knew it from the description I saw of it.

The witness was then asked if he remembered so testifying, and he stated that he did.

The following was read from his deposition:

"Q. State whether or not Mr. Shepherd made any representations to you as to the amount of money he had advanced to Mrs. Spencer at that time?

"A. Well, yes, he said he had advanced as I understood him, $800 or a thousand dollars.

83 "Q. State what were the terms which Mr. Lamme proposed to you, and which you reported to Mr. Shepherd for redemption?

"A. To pay me 7 per cent. interest, current interest and 10 per cent. of the profits when the land was sold.

"Q. Was Mrs. Spencer to have any interest in this?

"A. It was all to be sold by Mrs. Spencer, and she was to be consulted when the land was sold.

"Q. Who was to receive the other 90 per cent.; you say you were to receive the 10 per cent.; who was to receive the other 90?

"A. I understood Mrs. Spencer was. I got the understanding from Mr. Lamme and Mr. Shepherd both.

The witness testifies that he remembered so testifying in his deposition. The counsel for the defendants then read to him from the cross-examination at the time of that deposition the following:

"Q. You knew that Mr. Dickey had a deed to it?
"A. Yes.
"Q. Now, what was your objection at the time that Mr. Lamme made his proposition?
"A. Well, I didn't want to be indefinitely tied up.
"Q. Was that the only objection?
"A. It was the chief objection.
"Q. What part were you to take in the transaction?
"A. Only advance the money to redeem.
"Q. By whom was the redemption to be made?
"A. The redemption I understood was to be made by Mr. Dickey.
"Q. You say Mr. Dickey told you he did not intend to re-
84 deem?
"A. He himself did not intend to redeem.
"Q. You were referred to Mr. Shepherd?
"A. Yes.
"Q. Mr. Shepherd was the man you were dealing with when he referred you to Mr. Lamme? A. Yes. Q. Now, you say you didn't want to be indefinitely tied up. What did you mean by that? A. I didn't want to put up so much money as would be required to redeem all the property and have it invested on an uncertainty, of which I could not control the disposition. I didn't want to take that property without the power of sale except with the concurrence of Mrs. Shepherd or anybody else. I wanted to control the sale of it myself. It came to about $60,000 to redeem the whole of it. About $50,000 odd. I don't remember the exact amount; that was about what was figured on." Did you so testify?
A. I did, sir.

Mr. BOWER: Does that read "Mrs. Shepherd" or "Mrs. Spencer"?
Mr. CHAPMAN: "Mrs. Spencer"—well, that is evidently a mistake. It is "Shepherd" in the deposition, but you meant Mrs. Spencer.
The COURT: Oh, yes, I understand.

Q. By Mr. CHAPMAN: "Q. If the terms proposed by Mr. Lamme had been to give you seven per cent. on your money at all events, ten per cent. profits from the sale, and you to have the absolute power of disposition, would you have accepted it? A. I would not. Q. What would have been the objection then when the
85 voice of somebody else had been removed from the property?
A. I talked with other parties with a view to going in with them, and wanted to satisfy myself whether the property would be redeemed. The object of my going to see Mr. Dickey was whether the purchase made by him was made in good faith; whether he was the real as well as the record owner. That was the reason I had a talk with Mr. Dickey. Q. To get from him that although he was the record owner he was not the actual owner? A. Yes. Q. And

you interviewed Mr. Shepherd afterwards? A. Yes. Q. You say that he said he was the trustee. A. He told me very emphatically more than half a dozen times that he was trustee for Mrs. Spencer. Q. Was that trust declared? A. That was his language. He was simply doing it to shield and protect Mrs. Spencer. Q. Did he use those words, 'shield' and 'protect' Mrs. Spencer. A. He may not have used the word 'shield,' but he did use the word 'protect.' Q. In the course of the conversation with Mr. Shepherd, did you learn that if the property was redeemed from those sales and put on the market here that he, Shepherd, was to have a share of the profits? A. No, I did not. Q. Was there any deed made to Mr. Shepherd? A. I did not see any. Q. Have you never seen it? A. I have never seen it. Q. When you had a talk with Shepherd he referred you to Lamme? A. Yes, Mr. Shepherd told me very emphatically that he could not make any arrangements for Mrs. Spencer. I must see her attorney. Q. You did see him? A. Yes. Q. He talked
86 with you about it, and you were not satisfied with the terms? A. I got out of them all I wanted to. My object was to find out whether the property would be redeemed. Q. Why didn't you say that at the beginning? A. It may not have occurred to me. Q. Didn't you tell me your chief objection was that you didn't want to be tied up indefinitely? A. Yes. If I had intended to redeem, myself, I would not have accepted his terms. Q. Didn't you say that your chief objection to the acceptance of his terms was that? A. I don't remember whether I said that or not. Q. You went back and talked with Mr. Shepherd again? A. He came to see me. Q. You told him of the terms? A. Yes. Q. And you told him they were not satisfactory? A. I think very likely I did. Q. Didn't you testify a little while ago that that was what you told him? A. Yes. Q. And that he replied that he thought you were right about it? A. Yes. Q. Who were other parties that were negotiating with you at the same time, or that you were negotiating with? Clark & Bryan. Q. That is, Wesley Clark and his partner Bryan, in the real estate business? A. Yes. Q. Do you know for whom they were dealing? A. I do not. Q. Did you intend to put up all the money? A. When I talked with them I never had any idea of redeeming anything except the acreage property. I never gave them to understand that I would do anything else. Q. Can you remember what you said to them? A. I saw the gentlemen very often and I cannot repeat everything that was said. There was nothing said definitely on the subject. Q. Do you know whom Clark &
87 Bryan were dealing with. A. I do not. I think they owned some judgments or got control of some judgments. Your question brings up something that I had not thought of. I was not familiar with the laws of California about redemption of property, and I went up to Mr. Anderson's office here with Mr. Rhodes. Mr. Rhodes was going to redeem the town lots, the property here in Los Angeles, and I was going to redeem the acreage property. We wanted Mr. Anderson to give his opinion about the law bearing on a certain point, and I said then and there if what he said was the law I wanted nothing more to do with it, and I retired from the

case. Q. Do you know whether the other parties retired from the case? A. Don't think they did. Q. By Mr. BOWER—You spoke of your conversation with the other parties, Judge, when you refer to the acreage only. Whom do you mean by the other parties? Clark & Bryan? A. I do. Q. By Mr. CHAPMAN—Clark & Bryan, you say, wanted you to redeem the whole of it? A. Yes, at first, and I told them I did not care about putting up so much money as would be required to redeem the whole property. Q. Are you interested with Clark & Bryan in this matter? A. No, I have no interest in the case, whatever."

A. If you had consented to the admission of that testimony I wouldn't have been here today.

Q. How do you know I didn't consent?

A. Well, I—Mr. Anderson telephoned to me yesterday after he found I was still here, and wanted me to come down to the court-house. "Well," said I, "you have got my deposition. And,"
88 says I, "I don't want to go down to the court-house and stay there after having already given a deposition in the case;" and he said it was necessary to make preliminary proof that I was out of the city. And——

Mr. CHAPMAN: That is all.

A. And I asked him then to see whether you would consent or not, and he was to have advised me this morning by telephone, and I got a telephone message that I was required to come to the court-house.

Mr. CHAPMAN: I would like to have the whole of this deposition considered in. I have read pretty near all of it.

Mr. ANDERSON: That is all right.

The COURT: We will take a recess until two o'clock.

W. R. MCCASLIN, called on behalf of the defendants was duly sworn, and testified as follows:

I live out on what is known as the Spencer land. It is on the El Monte and Los Angeles road in this county, near Savannah. Have lived there four years in December. Have paid rents to Mrs. Anna P. Spencer, except last February or March, I think, I paid to Mr. Leon F. Moss.

Counsel for the plaintiff here objected to the statements of the witness as to who he paid rents to, upon the ground that it is irrelevant, immaterial and incompetent to whom he paid rents, or Mrs. Spencer's receiving them after the execution of the deed. The evidence was received, the ruling upon the said objection being reserved.

The witness continuing, testified: I paid the rent for the
89 year '97, probably about December, paid that to Mrs. Spencer; paid the rent for 1898 to Mrs. Anna P. Spencer in December, 1898.

Q. Did you ever have any notice of any change of ownership in the property up to the time that Mr. Moss notified you that he had acquired the property, along about February or March of this year?

The question was objected to on the ground it was irrelevant, immaterial and incompetent.

The court said: I will receive this testimony under the same understanding.

A. Mr. Moss notified me last February or March, some place along there, that he owned that property. Up to that time I had no notice to the contrary of Mrs. Spencer being the owner of it. Mr. Shepherd never applied to me for the rents. I never saw the man, nor did anyone ever apply for the rents for him.

DANIEL HUSCROFT, called on behalf of the defendants, and sworn, testified as follows:

In September, '97, I lived at 735 South Olive. I lived there a little over three years, probably three and a half. Not on property that is in dispute here, but a part of the property that was conveyed in that deed from Mrs. Spencer to Dickey.

The property occupied by the witness was also a part of the property that was sold under the foreclosure suits.

I paid rents between June and Christmas of '97.

It was here understood that the evidence of this witness would go in under the same objection, and the witness continuing:

I paid the rents to Mrs. Anna P. Spencer. That is the way
90 the receipts were made out. I paid up to the first of October of the year 1897. I moved out the first of October. Nobody else applied to me for rents prior to that except the public administrator sent me notice not to pay her any more rents. That was about the 22nd or 23rd of September.

Q. Did Mr. Shepherd ever apply to you for any rents?

A. Not by that name. No person ever applied for the rents. Never was notified of any change in the ownership of the property only by the public administrator.

AMOS L. BURBANK, called on behalf of the defendants, and being sworn, testified:

I reside in this county at Etiwanda. Do business in Los Angeles city. Am a real estate agent. Have been in that business some six or seven years, but during that time have been away several years. Returned here last August. Know Mrs. Anna P. Spencer. Know Charles J. Shepherd. Know Judge Lamme. Had negotiations with Mrs. Spencer in regard to a ninety or ninety-four acre tract in the southern part of the city, and two pieces of property on Spring street, one on Main street, one piece on Broadway, and the piece on Olive street. The negotiations commenced in February and March of '98. At that time I was living in San Jose. I came down here from San Jose to look over the property in June, '98. I came down again in September. I returned to San Jose, and left the matter entirely with my partner, Mr. Baker, to close it with Judge Lamme, who was the attorney for Mrs. Spencer, and represented her

as her attorney. The negotiations consisted of a tract of
91 land south of the city, a lot on Main street, two lots on Spring street, a lot on Broadway, a lot on Olive street, and some lots over at San Gabriel, and two acres of land. It is a piece of property I was formerly interested in. I had always thought a great deal of the property and stated to Judge Lamme if there was ever an opportunity of my securing it, I would be glad to be interested in the property. In February of '98 I received a letter from Judge Lamme speaking of the property, and stating there was an opportunity if a certain amount of money could be raised, of becoming interested in it, and at that time I took the matter up and undertook to raise the money to buy the property. I had one conversation with Mrs. Spencer, and she referred me to Judge Lamme. The negotiations with Judge Lamme were to the effect that I was to raise $55,000 in order to pay off the incumbrances on the property. That represented, as I understood it, all the incumbrances on the property. That I then was to pay Mrs. Spencer fifty dollars a month and to have forty per cent. of all of the proceeds over and above the mortgage, after that and the interest had been paid. That, of course, included the amount that we would have to borrow on the property to pay off this indebtedness. Mrs. Spencer was to have the other sixty per cent. Before these negotiations were turned over to Mr. Baker, they had gone so far that we had agreed on all the terms, and it was simply a question as to title, and the gentleman whom we represented—I say we, because Mr. Baker would have been interested there with me in the property—was willing to accept a
92 title that Judge Chapman would pass, and would not accept any other. But when I went North, I left it with Mr. Baker, so that when we could get the title in such shape that Judge Chapman would pass it, he could turn over the money to us, and we would close up the deal. Mr. Baker took it up after I left. Am acquainted with the values of these properties. I placed my own valuation on the property.

Q. What was the reasonable value of that ranch property, say in June 10, 1897, Mr. Burbank, that ninety or ninety-four acre ranch property, which was objected to upon the ground that it was irrelevant and immaterial, and the ruling upon the objection was reserved, and the testimony admitted with that understanding.

A. I valued the property when I came down here in June, '98, at a thousand dollars an acre. I think it was fully as much in '97. I placed a valuation on the Main Street property of two hundred dollars per front foot. I have forgotten how many feet; I think about forty-four. On Spring street, at two hundred and fifty dollars a front foot. That was the same lot, ran right through from Spring to Main, between Seventh and Eighth. There was another piece of property near Sixth and Spring. I placed a valuation of four hundred dollars per front foot. I think there is 34 feet. That property between Seventh and Eighth is 44 feet frontage. The Broadway property, my valuation on it was two hundred dollars per front foot. I think there was 80 feet. The Olive Street place, I valued at one hundred dollars per front foot. That was between Sixth and Seventh. I

think there is 60 feet of it. The ranch property El Monte, I
93 valued at one hundred dollars an acre. There is about 20 acres, I think. Have forgotten how many. I didn't pay very much attention to it. The San Gabriel property was lots, a great many lots. I have forgotten how many, but I know that my valuation on that was I reduced it to acreage, and estimated it to be worth one hundred dollars an acre. That lot over on the east part of town, my attention was called to, but I never went to see it. I could not place a valuation on it.

Q. As a matter of fact, it all went under these foreclosure sales, didn't it, for less than $60,000?

A. I don't know as to that. I have not followed the transaction up since Mr. Baker and I dropped it.

Q. That acreage property that you speak of, don't you know it has been on the market two or three different times in the last ten or dozen years?

A. I have not followed it up.

Q. Well, didn't you have something to do with trying to sell it once before?

A. I have sold the ranch at one time for $180,000. Mrs. Spencer received one-half in cash at that time, and afterwards got the land back for the other half. In my negotiations with Mrs. Spencer and Lamme I was to get the money to redeem it from all those incumbrances, and then sell it, and when I got the money back, I had forty per cent. of the proceeds, and she got the other sixty.

Q. Do you know that?

A. She was to get it.

Q. How did you know it?

94 A. Well, that was my understanding with Judge Lamme.

Q. Can you state how you got the understanding? What was said that led you to infer that?

A. Why, Judge Lamme stated to me himself that if we made those negotiations, that Mrs. Spencer would have to retain sixty per cent. of the property after this mortgage of $55,000 was paid off, thereby forty per cent. coming to us. Mr. Baker and myself were to do the selling of the property.

Q. Were you to get a deed of it?

A. We were to place the matter in the hands of a bank and whenever a sale was made, that was to be released, with mortgage taken back, if it was not a fair cash sale, and those papers were held as collateral security until the mortgage was finally paid.

Q. What mortgage was finally paid?

A. The original mortgage. The money that we borrowed to clear the title to the property. We were going to do the selling. There was to be a deed made, Mrs. Spencer was to make a deed, and we were to do the selling, and when we got the money back, we were to divide these proceeds. I said this party was going to put up the money, if you (referring to Mr. Chapman) passed the title. I could not say as to whether the title was ever submitted to you or not. I know that I wrote Mr. Baker to hurry it up, and have you pass on the abstract, and left it with him, and he said he would. I un-

derstood him to say that he had been to you several times, but the proposition never was gotten in shape. He never said that he ever came to you with an abstract. I think he said that there
95 was a certificate furnished, but it was unsatisfactory. I could not say that he ever presented the certificate to you. I talked to you about it myself. I told you that our instructions were to the effect if you would pass that title, we could have the money. The money was in the bank waiting for us. I did not present any certificate or abstract. We wanted the certificate furnished by the Title, Insurance & Trust Company, which you said you knew, you wanted that kind of a certificate, and we never got it.

It was here stipulated that the property referred to by Burbank was included in the deed to Dickey. The Dickey deed included all the property that Mrs. Spencer had, and it was under these mortgages, but they were all paid off or redeemed or something of that kind.

M. P. SNYDER, was called as a witness for the defendants, and being sworn, testified:

Reside in the city. At present engaged in the real estate business, and loan business. Been actively engaged in the real-estate business about ten years altogether. Began in '83. Am acquainted with these properties which were testified to by Mr. Burbank.

Q. What would you consider the reasonable value, Mr. Snyder, of that 94-acre ranch property in the southern part of the city, which Mr. Burbank testified to?

The COURT: Oh, Judge Chapman, have you any objection in this matter, if any testimony is admissible at all, that it will be taken of the value of $132,000 and over?

96 Mr. CHAPMAN: I have no objection to stipulating that seventy-five people will swear to that, but as a matter of fact this property has been hawked about this city for the last ten years, and went under these foreclosure sales.

The COURT: I speak about the value in 1897.

Mr. CHAPMAN: As a speculative value, I know a number of people would testify to that, and I can say to counsel here now that I don't intend to offer anything in opposition to it, except the sale of the property under foreclosure.

Mr. ANDERSON: When you speak of the property going under foreclosure, you do not mean that as an exact statement? The ranch itself was redeemed.

Mr. CHAPMAN: I mean it was—it was not redeemed until after the sale.

Mr. ANDERSON: No, that is true, but the title did not pass.

The COURT: Oh, we all know that on a suit for foreclosure, the property sold for the amount of the mortgage.

Mr. ANDERSON: I mean it was redeemed by the successors of Mrs. Spencer.

And here by agreement of counsel for plaintiff, no further evidence was offered of value, the testimony having gone to the extent

of about $132,000, and over, and the counsel for the plaintiff said that the only testimony he would offer to the contrary would be what the property sold for.

EUGENE BAKER, was called as a witness on behalf of the defendants, and sworn, testified as follows:

97 I reside in Los Angeles. Been in the real-estate business. Am a partner of Burbank's. Had something to do with the negotiations with Mrs. Spencer, Shepherd and Judge Lamme in regard to some ranch property, about 90 or 94 acres, here in the city, and two lots on Spring street,—and enumerating the other property as Mr. Burbank had.

I had negotiations with Mr. Lamme, her attorney, and Mr. Shepherd. I never met Mrs. Spencer. Mr. Burbank had negotiated with Mr. Lamme, Mrs. Spencer's attorney for some time, and the basis of that negotiation was that we were to obtain a loan upon the property, and Mr. Burbank and Lamme had come to a combination—understanding as to the terms and conditions, provided we could furnish the money. I had a client who had the money, and the only question that was involved with me was the question of title, and I asked for an abstract, and the opinion of Judge Chapman; but before going to the expense of an abstract, I requested Judge Lamme, who knew all the details of the title, to make a statement to Judge Chapman, so that he could say whether under that condition of the title, he would pass it. We never went any further than that point. In my negotiations with Judge Lamme, he was acting for Mrs. Spencer, was my understanding. At first I did not meet with Mr. Shepherd. I did at last, towards the last week or ten days of our negotiations. I did not inform Mr. Shepherd that I was negotiating with Judge Lamme. He knew all about it through Judge Lamme, and came into the office with Judge Lamme to get an answer. We stated to

98 him that it was necessary for Judge Lamme to go to Judge Chapman, and make this statement before I could do anything; that I would then go to Judge Chapman, and get his opinion. We finally made a date at Judge Chapman's office and met there, and Judge Chapman was busy and made an engagement for 5 o'clock in the afternoon, at which time Mr. Shepherd and myself were at Judge Chapman's office, but Judge Lamme did not come, so that ended the negotiations. That was in the fall of '98, along in September or October, but I cannot give the exact date.

Cross-examination:

I don't remember whether when Judge Lamme failed to come at the time appointed, we made an appointment for the next morning or not. I know we didn't come back. I don't know whether Mr. Shepherd did, or not. I wanted Judge Lamme to talk with you, and make a statement to you of the condition of the title, and then you could tell him from that statement whether you could pass the title in that condition. I wanted him to do that before we went to the expense of ordering an abstract, which would be expensive. I had read in the papers of some suits brought by Isabel Spencer and

others against Mrs. Spencer, about this very property, but I didn't follow them very closely.

Q. When you talked of what Mr. Lamme was to talk with me about, wasn't it to explain to me what was the situation of that suit?

A. No, sir, I had no interest in the suit whatever, or in anything about it. The only interest I had was in making the loan,
99 and I wanted to know whether you would pass the title. I didn't know that the pendency of the suit was one of the very material questions that affected the title of the property. I expected Judge Lamme to tell you (speaking to Mr. Chapman) the condition of the title, which I thought he was entirely familiar with, sufficiently enough so that you could say whether, if that were true, you would pass the title.

SAM KEE, called as a witness for the defendants, and being sworn, testified:

He lived on Spring street; ran a wash-house; rented from Mrs. Spencer; paid rent to her along in 1897.

Q. After June?

A. Why, by that time I gone away. I went away that time, about three years ago. I have been sold out, and I come back; been there two years. I think I went back about December, '97. I pay rent now to Mr. Wevse. In '97 I don't know. By that time other man pay it.

Paper is here shown the witness, and he says that that is one of the receipts he received from Mrs. Spencer, but the year in which it was made was not on the receipt. Further testified that he never paid Mrs. Spencer the rent when he came back.

ORANGE E. DICKEY called as a witness for the defendants, and being sworn, testified as follows:

I am the Orange E. Dickey to whom Mrs. Spencer executed a deed in June, 1897. There was no consideration paid by me for
100 that deed. I executed a deed in 1897, but I don't know who it was to. Don't know whether it was a Mr. T. L. Stiles. Made the deed at the instance of C. J. Shepherd. I don't know how much property this deed made by Mrs. Spencer to me of June 10, 1897, conveyed. I executed a deed also to Mr. Shepherd. Those are all the deeds that I executed with reference to that property. I received nothing from the grantee to whom I executed the deed at Mr. Shepherd's instance, and nothing from Mr. Shepherd when I made the deed to him.

Q. Can you state what was the reason you executed that deed to Mr. Stiles?

A. Mr. Shepherd told me that there was a deed in Judge Lamme's office that he wanted me to sign, and I did so at his request. Nothing was said to me about the object of it. I don't remember the date when I first learned of the making of the deed of June 10th, '97, of Mrs. Spencer to me. Was not present when it was done. The deed

never was in my hands at all. Mr. Shepherd told me that it had been executed, did not tell me the object. Told me that he was going to execute a deed to me, and asked if it would be all right.

By the COURT:

Q. You say you never saw the deed?

A. Never did. I told him yes, anything that he would do was all right. I was Mr. Shepherd's bookkeeper. Have got the book at the office that shows the account between Mr. Shepherd and Mrs. Spencer for those years. I did not bring the book. It is in Mr. Shepherd's office. I have a statement here that is drawn off, copied from the books. It is a copy from the books. That is, a statement
101 that Mr. Shepherd drew off. I don't know anything about it. I just checked it off the book, and saw that those same entries were made. I don't know what appears at the top of the book.

Cross-examination:

I had nothing to do with negotiating the transaction at all; was working for Mr. Shepherd. The deed was made from Mrs. Spencer to me, and from me to Stiles, and from me to Shepherd, all under the direction of Shepherd. The transaction, whatever it may have been, was for him all the time.

Questions by the COURT: You have never talked with Mrs. Spencer?

A. Not in regard to the case. No.

This statement of items purports to represent moneys that Shepherd has paid either to or for Mrs. Spencer, and the various things that are set forth there—these are all items from Mr. Shepherd's book of an account between Shepherd and Mrs. Spencer. Mr. Shepherd first made the statement and brought it with him here this morning, and when he had to go to El Monte this afternoon he gave me the statement, and asked me to check it over with his book, and bring it here, so that I could verify this statement, and I did. This is a correct transcript of the account.

E. H. LAMME, called on behalf of the defendants, and being sworn, testified as follows:

Am practicing law.

Q. Are you connected or interested with any party that has an interest in this case?

102 A. I am counsel for Mr. Clark, of Clark and Bryan.

Q. Who are interested in the case, I suppose.

A. Yes, sir, that is to that extent. I was attorney for Mrs. Spencer in connection with the making of the deed from Mrs. Spencer to O. E. Dickey in June, 1897. I know how it came about that that deed was made. I have the consent of Mrs. Spencer to testify in the case.

Counsel for the plaintiff objected to the testimony of the witness upon the ground that it was irrelevant and immaterial, and

concerning confidential matters between attorney and client, and the witness said :

I wish to make a personal explanation to the court. Mrs. Spencer was—I had been consulted about this matter frequently. I talked with Mr. Variel about it, and the matter having been entirely closed up between Mrs. Spencer and Mr. Shepherd—when I was talked to about it at first, I would have nothing to do with it at all—and after consulting Mr. Shepherd, Mrs. Spencer was subpœn-ed here, and she was not in a condition she could testify very well, and she requested me to consent to get the attorneys upon this side to consent that they would not insist upon her coming to testify, but that she would release me from all relations of any kind, and requested me to testify to the facts in connection with the case. That is the way I am—the reason I consented to testify at all. It was at her special request.

Thereupon the objection of the counsel was overruled, but it was understood that the objection interposed to the declarations
103 of anything that Mrs. Spencer may have said after the making of the deed should still continue, and as to the overruling of the objection to the witness's testifying, the plaintiff excepted.

The WITNESS: I wish to say, however, in relation to the matter, I was not attorney for Mr. Shepherd at all in any connection whatever; but I wish to say further, however, that I consulted with Mr. Shepherd before I would consent even then to accept the release—or comply with Mrs. Spencer's request, and he also requested me to testify.

By Mr. BOWER:

Q. I will get you to state how it came about that that deed was made, and what the purpose of the deed was.

By the COURT:

Q. State the facts and circumstances connected with it.

A. The purpose of the deed originally was to get money enough to carry on an appeal. There was some twelve or fifteen hundred dollars in the way of costs that had to be raised. I had endeavored to procure somebody to advance the money, and also had made—was anticipating trouble with reference to these various claims, mortgages, and several judgments, or threatened judgments, and had made effort to procure somebody that would advance the money. Almost immediately I was met with the objection that Mrs. Spencer was involved in litigation, and that it would be very difficult to get anybody to advance money, even in a small sum, and particularly in a larger sum which would be necessary to protect the property. Therefore I concocted the scheme of putting the property in the hands of Mr. Shepherd, or—I had intended to get somebody
104 else, but Mrs. Spencer having been—had business relations with Mr. Shepherd, brought him into the office; and the idea was to put the property into the hands of Mr. Shepherd absolutely,

without any agreements, so that Mr. Shepherd might deal with the property absolutely so far as all third parties were concerned, which would enable him to raise whatever money would be necessary, and to go on and carry on this litigation and also to take up these mortgages and the judgments, in the event that it became necessary to do so; but it was—there was no agreement with reference to any trust, because of the fact that I had been met almost at the outset with the statement from gentlemen to whom I had gone for the purpose of negotiating loans that if Mrs. Spencer was mixed up with it on account of this litigation it would be impossible to raise the money. The deed was then executed upon the statement of Mrs. Spencer that she had ample confidence in Mr. Shepherd's integrity, to take the property, do with it as he pleased, and when the matters were finally cleared up, to make a just and satisfactory arrangement with her; a settlement. The conveyance was made absolute, and was made so purposely. It was made to Dickey by Mr. Shepherd's suggestion. I had never seen Mr. Dickey at that time; but Mr. Shepherd said that he was his confidential clerk and bookkeeper, and he was perfectly willing to vouch for his integrity and absolute honesty.

By Mr. BOWER:

Q. Was there any mention made at the time of the indebtedness that Mrs. Spencer owed Mr. Shepherd, during your conversations?

105 A. There were a great many conversations with reference to it. Mrs. Spencer was indebted according to their talk, in some considerable amount, probably several thousand dollars, to Mr. Shepherd at the time, and at the time this conveyance was made, there was, I think, my estimate was about twelve hundred and fifty, possibly fifteen hundred dollars in the way of costs, and it was absolutely necessary to raise it immediately for the purpose of perfecting the appeal in that suit of Elizabeth Spencer against Mrs. Anna P. Spencer.

By Mr. BOWER:

Q. The deed, then, as I understand you, Judge, was made absolute on its face for the purpose, then, of not handicapping or hindering Shepherd in handling the property?

A. The purpose of making the deed was that the property should be put in the name of Mr. Shepherd for the purpose of taking it and securing all the moneys that he had advanced, and if it became necessary for him to mortgage it, to do so, and that there should be no agreement back of it that anybody could dig up and—for the purpose of interfering—we had been handicapped in every way whereever we had gone to arrange for money, we had been told inside of twenty-four hours that somebody had been there making dire threats about what they were going to do with reference to ripping up any arrangements that we had made, because of the fact that Mrs. Spencer was involved.

The COURT: I understand from the witness—if I don't understand him correctly, I desire to be corrected—that this conveyance was made to Mr. Shepherd for the purpose of enabling him to
106 handle the property, and raise any money necessary to carry on litigation that might thereafter be necessary.

A. Without any agreement whatever, he was to take the property.

The COURT: I understand she was to trust him about the final outcome, when he got it disposed of that he would look after her interest in the matter?

A. Yes, sir.

By Mr. BOWER:

Q. What was said, if anything, about the indebtedness of Mr. Shepherd?

A. Well, it would be very difficult to say what was said, it was talked over so much and so often. The substance of it was that Mr. Shepherd was to take this property, he was to take it absolutely, and he was to make whatever advances were necessary, and then when the matter was cleaned up and he got all the money back, that then he would make a satisfactory adjustment with her, and she took it absolutely without a scratch of a pen, and permitted him to take the property. In these discussions nothing more was said in reference to the indebtedness existing between them, than it was stated at various times about these various sums that were due from her to Shepherd. As these various judgments or prospective judgments were discussed, and there was an estimate made of the amount that would probably be required to clean up all of the indebtedness of Mrs. Spencer. When the deed was first made, the immediate and present necessity was only about fifteen hundred dollars, that would have to be raised. There were, however, threatenings then of foreclosures of these various mortgages. I don't know whether
107 Mr. Shepherd was to keep any account of these things or of the amounts that he should pay out or not. He did, so far as the payments were to be made through me, he would make the checks payable to Mrs. Spencer, and they would then be endorsed by her.

By Mr. BOWER:

Q. Why was it that there was no particular agreement as to what would be the winding up and settlement between Mrs. Spencer—was it on account of the confidence that Mrs. Spencer had in Shepherd that he would do what was right?

Mr. CHAPMAN: We object to that on the ground it is irrelevant and immaterial——

The COURT: Yes. He may state what was said, if anything, between Mrs. Spencer and Mr. Shepherd, as to why no definite arrangement was agreed upon as to the amount—to subsequent acts.

A. Well, I don't know of anything being said between Mr. Shepherd and Mrs. Spencer. The thing, of course, very naturally suggested itself to my mind very promptly when it was property that was to be conveyed without any agreement, and Mrs. Spencer very frequently assured me, and very promptly, that she had the utmost confidence in Mr. Shepherd, that she had done business with him for a long time, and had had very large financial transactions.

Q. Did you or did you not advise against any written agreement?

A. It was my own scheme not to have anything to interfere with Mr. Shepherd's control of that property absolutely, and to do it in a way that he wouldn't be in any wise hampered by anything in the nature of a trust that anybody could get hold of while he was
108 dealing with the property, because it was a very considerable amount of money; while the property was regarded as very ample security, at the same time, to borrow forty or fifty thousand dollars requires a very keen tact. I heard Mr. Burbank's and Mr. Baker's testimony in regard to the negotiations about the property. Mr. Shepherd was advised and knew of those negotiations between Mr. Burbank and Mr. Baker and myself, as representing Mrs. Spencer. But the negotiations are not exactly as——

Q. I am not asking you as to what the exact negotiations were——

A. Oh, yes, Mr. Shepherd was in very frequent conference with us in reference to the matter. Mr. Shepherd had conversations with me in regard to the negotiations with Judge Bonner. My first negotiation was, I think, with Mr. Clark, among the first, and I am not certain whether it was through Mr. Clark or Mr. Shepherd, that I saw Judge Bonner. I know that Mr. Shepherd had conferences with Judge Bonner prior to the time that I saw him, but I am not certain whether it was through Mr. Clark or through Mr. Shepherd that I first saw Judge Bonner. The first negotiation in my recollection now was with Mr. Clark, and in which I suggested that the property be absolutely placed in the hands of Mr. John E. Plater and Mr. Pridham. I had then talked to him, and I think Mr. Plater—I don't know whether anything was said to him about it, but I saw Mr. Pridham, and Mr. Pridham was willing—and Mr. Shepherd. Those three were the ones I suggested. I saw Mr. Pridham, and don't know whether I saw Mr. Plater or not; I saw Mr. Plater,
109 however, with reference to the matter prior to the conversation with Mr. Shepherd. I had tried to get him to go into the deal with me. The deed was made to Stiles upon my advice. Stiles is a non-resident. He is a gentleman that lives in Tacoma. He had at that time very recently gone off the supreme bench, and these mortgages were threatening. And I thought we were going to be able to take them up. My object was to hold them off long enough until we could conclude negotiations to take them up, and therefore I advised that the ownership be put in the hands of a non-resident to prevent an immediate foreclosure, and I would save ninety days on publication of summons. Stiles was not here. I prepared the deed, had it recorded, sent it to him, prepared another deed, reconveying the property—I think you will find that deed is a very few days after the original deed, and had it brought back

here, and it was afterward recorded. And it was done for this purpose, for the purpose of delaying the foreclosures long enough, if possible, to enable us to conclude a negotiation that would prevent this enormous expense.

Q. Was there any agreement or contract between Mrs. Spencer and Shepherd, that he was to raise this forty or fifty thousand dollars to pay off these mortgages and judgments, or was it simply conveyed to him that he might, if possible——

A. He made no agreement to do anything; no obligation. There was no contract made. Mr. Shepherd seemed to be the only person we could get hold of that had financial influence and money enough to carry the transaction. We were very glad to get him without getting him—compelling him to enter into any binding obligation that would embarrass him. He did procure the fifteen hundred dollars. That was not the extent of his advancement. I think at various times he advanced other sums, and in the final settlement he advanced very large sums. I think the advances were somewhere in the neighborhood of fifty or sixty thousand dollars. I looked at this statement from Mr. Shepherd's book a minute ago. There is a part of those I know nothing about. Those two hundred and fifty dollar items, dated July 10, 17 and 22, were, I think, paid on the transcript, and there was an item of three hundred and eighty dollars, and four hundred and thirty-three dollars, one in December and the other in January, '98 or '97, and January, '98, that I think went on the cost bill. The small items there I don't know what they were. But about those sums of money—there is February 3, '98, a hundred dollars, was advanced to me for the purpose of paying expenses to San Francisco in reference to a motion to dismiss the appeal in the case of Spencer *v.* Spencer.

Cross-examination:

I continued to be the attorney for Mrs. Spencer until this settlement with her and Shepherd. I cannot tell the date of that settlement. It must have been some time last winter. I don't know whether Shepherd made any deed to Rhodes about the time of that settlement, or not. Mr. Variel was Shepherd's attorney, and he conducted all the matters. Mrs. Spencer, at the time of that settlement, made a confirmatory deed to Shepherd, and a judgment was entered confirming the title. That is my recollection. There were so many of those papers—but that is my recollection. I should think that was in February or March, of '99. I cannot give you the details of that settlement, how Shepherd and Mrs. Spencer settled. Mr. Variel made that himself.

Q. You know that Shepherd and Mrs. Spencer were both paid something?

A. Well, the details of it I don't know.

Q. I am not asking for the details.

A. No, I don't know anything about what that was, because it was made through Mr. Variel for Mr. Shepherd, and Mrs. Spencer simply consented to it. I was acting for Mrs. Spencer, but we were in the position of taking whatever we could get, and we did.

Q. Don't you know that Shepherd got a part of the property?

A. I know he got the bulk of it in that settlement.

Q. Now, you remember a suit that was brought by Isabel Spencer against A. W. Rhodes, E. R. Nichols, Emma R. Lamme, Howard W. Fish, Anna P. Spencer, Frank M. Kelsey, administrator, John Burr, sheriff, T. L. Stiles, Orange E. Dickey, Charles J. Shepherd, R. H. F. Variel, John D. Hooker, Charles R. Bishop and Henry C. Weyse, receiver?

A. I do.

Q. The suit is numbered 31371 on the register of the superior court.

A. I remember that Mr. Shepherd's deposition and Mrs. Spencer's were taken in that case. I was present at the taking of that
112 deposition as the attorney for Mrs. Spencer. I took part in the cross-examination of the witness.

Q. I will call your attention to the fact that the original complaint in that suit was filed August 19, 1897; the amended and supplemental complaint upon which the trial was had, with the depositions taken, December 13, 1898.

The depositions of those parties were taken for the purpose of making inquiry into the circumstances of that transaction, were they not?

A. I don't know what their purpose was in taking them. I supposed that was what they were taken for. I don't know. I was present at least when Mrs. Spencer's deposition was taken. I am not certain I was there when Mr. Shepherd's——

Q. You took objections to some of the questions?

A. Mrs. Spencer, yes, I did. And advised her with reference to some questions, not to answer them.

Q. Mr. Lamme, is it not a fact that at the time of this Shepherd transaction, that there were mortgages on all of the property of Mrs. Spencer, which was the subject of that deed?

A. There were mortgages on all the property unless it was some of that San Gabriel property, is my recollection. It is a fact that the interest on those mortgages was past due, that the mortgagees were threatening to foreclose them. A month or two prior to the time that that deed was made to Dickey, there had been a decision by Judge Van Dyke, given in the superior court of Los Angeles county, in the suit of Isabel Spencer and James D. Spencer.

113 Q. Have you knowledge of any arrangement existing between them as to any interest that she has in the property?

A. I had knowledge at the time, but I would not attempt to even give a general impression. At that time I was making endeavors for her, or aiding her in an attempt to borrow money, and everybody else was, and I was not able to do it. I finally did, but up to the time we found Mr. Shepherd, we didn't. He was the only man we found that we could get to financier the transaction. It is a fact that in my office in the Bradbury block, and while I was negotiating with Mr. Shepherd, Mrs. Spencer stated to Shepherd that she wanted to make some arrangement or agreement of some kind, whereby he should take the property as a trustee, and Shepherd refused to

have anything to do with it on any such conditions as an expressed trust. He said that he wouldn't take it with any strings on it, or anything of that kind, and he did it under my advice and suggestion; and it was also stated that after he got through the management of the property, that if he saw fit to do so, he would give Mrs. Spencer something. There was no amount agreed upon at all. It was tacitly understood that he would—in fact she had repeated to me time and again, that Mr. Shepherd was a gentleman, and she had sufficient confidence in him to be satisfied to take his settlement subsequently in the arrangement.

Redirect examination:

My recollection is that there was a deed from Mrs. Spencer to Shepherd, along about February 14, 1899, a confirmatory deed, confirming this whole transaction, and subsequently a judgment rendered.

114 An objection was here interposed to the statement, and the witness said:

A. Well, perhaps, I should not use the word "confirmatory;" but there was another deed made subsequently, and the judgment entered. That is my recollection of it. At the time that second deed was made, I think there was something paid by Mr. Shepherd to Mrs. Spencer. I don't know how much. I think Mr. Shepherd paid her a thousand dollars, about that; but I would not attempt to give the amount.

The COURT: I understand she retains an interest in the property now, in the name of——

A. Well, Mr. Shepherd has a deed of the property absolutely. I think there is some agreement between them.

Q. That he holds a trust for her to a certain ratio?

A. Well—he probably personally obligates himself to pay after he has realized.

By Mr. CHAPMAN:

Q. On a sale of the property?

A. Yes, I don't recollect what it was—what that agreement was. Mr. Variel wrote all those agreements.

By Mr. CHAPMAN:

Q. Do you know whether Rhodes paid her anything at the time of that ——

A. I don't know. Not that I know of.

By the COURT:

Q. Mr. Rhodes and Mr. Shepherd have any connection with this matter of the deal at any time during its progress? Were they jointly interested in any of these various settlements and arrangements?

115 A. No, sir, cross-ways; opposing each other. I think they were hostile. Of course I never at any time represented Mr. Shepherd, but from remarks that I heard from both sides, I inferred that there was hostility, rather than very great friendship.

By Mr. CHAPMAN:

Q. Well, their hostilities were settled in this settlement, were they not?

A. I think they were.

The COURT: Do I understand the witness' last statement to be that the controversy between Mr. Rhodes and Mr. Shepherd, growing out of this transfer, was settled and adjusted in that settlement?

Mr. CHAPMAN: Yes, sir, the whole controversy was settled, and the carcass of Mrs. Spencer was divided between them, as I understand it.

Mr. ANDERSON: I object to any such statement as that. I would like Mr. Lamme to take the stand.

By the COURT:

Q. The statement was made—Mr. Chapman asked you a question as to whether or not the hostility and antagonism between Rhodes and Shepherd was not fully settled and adjusted in the settlement between Mrs. Spencer, Rhodes and Shepherd. I ask now whether or not the differences and the claims that Rhodes made and which Shepherd made by reason of this conveyance to him, if you mean to say they were settled and adjusted in that controversy?

A. Oh, there is no—I don't understand that Shepherd has anything to do with this Broadway property at all. I understand that everybody——

116 Q. That isn't the question. The Dickey deed contained all the property of Mrs. Spencer, didn't it?

A. It contained practically all the property.

Q. Now the Rhodes' redemption redeemed all this property that had been sold under these foreclosures?

A. Well, I don't recollect about it, whether it included all of it or just certain portions of it. The redemptions came in there so thick and so many of them and from different directions that I wouldn't attempt to recollect it. I think Mr. Shepherd was attempting to redeem, and so was Rhodes, and it included all this property.

Q. Now, when they had this settlement in February, 1899, all controversies between them as to who was entitled to this one and that were settled, were they?

A. Well, I had nothing to do with Rhodes or Shepherd in that settlement.

Q. Well, was that settlement reduced to writing?

A. I think so.

By Mr. ANDERSON:

Q. Mr. Lamme, do you want the court or Mr. Chapman to understand you to say that any controversy with respect to this particular lot was settled between Mr. Rhodes and Mr. Shepherd?

A. Unquestionably I do not. I don't know whether there was any settlement made between Mr. Rhdoes and Mr. Shepherd at all, because I never represented either one of them. I don't want the court to understand that Mr. Shepherd attempted to redeem this particular lot. I don't know as a matter of fact what part of it was redeemed.

I don't know what the settlement between Mr. Rhodes and
117 Mr. Shepherd was. All those redemptions were made by Judge Variel, and I never knew anything about it except just generally.

LEON F. Moss, called on behalf of the defendants, and sworn, testified:

Am one of the attorneys in the action of Isabel Spencer against Anna P. Spencer *et al.* I don't remember how long after the decision in that case it was that I served notice on tenants not to pay rent. I never made an offer to Judge Lamme after the suit had been decided by Judge Van Dyke, for Mrs. Spencer's interest in that property. I authorized Mr. Swanwick to make an offer. I was not present when the offer was made.

Mr. BOWERS: Under the agreement to stipulate as to records, we desire to offer in evidence the tax statement for State and county taxes made by Charles J. Shepherd in 1898; also the tax statement made by Charles J. Shepherd, State and county taxes for 1899; also the tax statement made by Charles J. Shepherd for city taxes for 1898.

All of which was objected to by counsel for the plaintiff, and the objection was overruled by the court and plaintiff excepted.

Counsel for the defendants put in evidence also the tax assessment book of '97 which showed that Shepherd allowed the taxes on this property included in that deed to go delinquent and paid taxes on his own property, and also a certified copy of the complaint and summons in the case of Mulligan *vs.* Spencer, now pending in

the superior court, which was a suit against Mrs. Spencer by
118 Mulligan, with a prayer for judgment for $43,600 and interest and costs. Suit was filed March 14, '97, and service of summons made on Mrs. Spencer the 28th day of April, 1897.

The following is a copy of the complaint in that action:

STATE OF CALIFORNIA:

In the Superior Court of the City and County of San Francisco.

THOMAS MULLIGAN, Plaintiff,
vs.
ANNIE P. SPENCER, Defendant.

Now comes the above named plaintiff, Thomas Mulligan, and complains against the above-named defendant, Annie P. Spencer, and, for cause of action, says:

I.

For a first cause of action:

1. That, on or about the second day of October, A. D. one thousand, eight hundred and seventy-eight, at the city and county of San Francisco, State of California, the plaintiff placed in the hands of the defendant, and deposited with the defendant for safe keeping for him, the said plaintiff, the sum of ten thousand dollars, in gold coin of the United States; that the said defendant then and there received the said money from the said plaintiff in trust that the said money should be so held by the said defendant, and that, on the request of the said plaintiff, any part of parts, or the whole of said money should be returned to the said plaintiff by the said
119 defendant; that the said defendant, until within less than two years last past, has always acknowledged that the said defendant so held the said money in trust for the said plaintiff; but that the said defendant, upon the request of said plaintiff, prior to the commencement of this action, while expressly acknowledging the said trust, has failed and neglected, and still fails and neglects to pay the said money or any part or portions of the said money to the said plaintiff, in gold coin of the United States, or in any currency, or at all, save and except the sum of seven hundred and fifty dollars in gold coin of the United States.

2. That, by reason of the premises in this count averred, the said sum of ten thousand dollars, with interest thereon from the date aforesaid, aggregating, principal and interest, the sum of twenty-two thousand six hundred dollars, in gold coin of the United States, is now due and owing from the defendant to the plaintiff.

II.

For a second cause of action:

That, heretofore, to-wit: on or about the sixteenth day of April, A. D. one thousand eight hundred and ninety-seven at the city and county of San Francisco, State of California, the defendant was justly indebted to the plaintiff in the sum of twenty-one thousand dollars, in gold coin of the United States, for so much money of that kind before that time had and received by the defendant to and for the use of the plaintiff; and, being so indebted, in consideration of the premises, the defendant thereafter, to-wit: on the date and at
120 the place in this count aforesaid, undertook, and then and there faithfully promised to pay the said sum of twenty-one thousand dollars, in gold coin of the United States as aforesaid, whenever the said defendant should be thereunto by the plaintiff afterwards requested; yet, though often so requested, the defendant has neglected and refused and still neglects and refuses to pay the sum last aforesaid, or any part thereof to the plaintiff, in gold coin of the United States, or in any currency, or at all, and the said sum with interest thereon, from and after the date last aforesaid, remains wholly due and unpaid.

Wherefore the plaintiff demands judgment against the defendant in the sum of forty-three thousand six hundred dollars, interest as

aforesaid, and the costs of this action, and that by the terms thereof the said judgment be made payable in gold coin of the United States.

Dated, San Francisco, April 17, A. D. 1897.

HENRY E. HIGHTON,
Attorney for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco. }

Thomas Mulligan, having been duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as the matters therein stated on his information and belief, and that as to those matters he believes it to be true.

THOMAS MULLIGAN.

121 Subscribed and sworn to before me this 17th day of April, A. D. 1897.

[SEAL.] W. T. HESS,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed.) Superior court, city and county of San Francisco, State of California; Thomas Mulligan, plaintiff, *vs.* Annie P. Spencer, defendant (Copy) complaint: Filed Apr. 20, 1897, C. F. Curry, clerk, by Joseph Riordan, deputy clerk.

(*Clerk's Certificate to Copy.*)

I, Wm. A. Deane, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the superior court, in and for said city and county, hereby certify the foregoing to be a full, true and correct copy of the original complaint in the above entitled cause, filed in my office on the 20th day of April, A. D. 1897.

Attest my hand and seal of said court, this 20th day of October, A. D. 1899.

[SEAL.] WM. A. DEANE, *Clerk*,
By THOS. A. DAVIES,
Deputy Clerk.

(10c. I. R. stamp, cancelled.)

(Endorsed:) Filed Aug. 12, 1897, T. E. Newlin, clerk, by Geo. Varcoe, deputy.

122 In the Superior Court of the City and County of San Francisco, State of California.

Department No. —.

THOMAS MULLIGAN, Plaintiff,
vs.
ANNIE P. SPENCER, Defendant.

Action brought in the superior court, city and county of San Francisco, State of California, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said superior court.

The People of the State of California send greeting to Annie P. Spencer, defendant:

You are hereby required to appear in an action brought against you by the above named plaintiff in the superior court, city and county of San Francisco, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county; or, if served elsewhere, within thirty days.

The said action is brought to recover the sum of twenty-two thousand six hundred dollars, being principal and interest of the sum of ten thousand dollars, received by defendant from plaintiff for safekeeping, October 2, 1878, in trust that any part or parts or the whole of said sum should be returned by defendant to plaintiff; also to recover the sum of twenty-one thousand dollars and interest,
123 being money had and received by defendant to and for the use of the said plaintiff.

All of which will more fully appear in the complaint on file herein to which you are hereby referred.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for the sum of forty-three thousand six hundred dollars, interest and costs of suit as prayed for in said complaint.

Given under my hand and seal of said superior court at the city and county of San Francisco, State of California, this 20th day of April, in the year of our Lord, one thousand eight hundred and ninety-seven.

[Seal of the Superior Court.]

C. F. CURRY, *Clerk*,
By JOSEPH RIORDAN,
Deputy Clerk.

OFFICE OF THE SHERIFF OF THE
COUNTY OF LOS ANGELES.

I hereby certify that I received the within summons on the 22nd day of April, A. D. 1897, and personally served the same on the 23rd day of April, A. D. 1897, on Annie P. Spencer, by delivering to

Annie P. Spencer, said defendant, personally in the county of Los Angeles, a copy of said summons attached to a copy of the complaint in said action therein named.

Dated at Los Angeles, this 28th day of April, 1897.

JOHN BURR, *Sheriff*,
By S. P. REES,
Deputy Sheriff.

(Endorsed:) No. 59,144: In the superior court, city and county of San Francisco, State of California; Thomas Mulligan, *vs.* 124 Annie P. Spencer; summons; (Endorsed:) Filed May 4, 1897, C. F. Curry, clerk, by T. I. Maher, deputy clerk; (Endorsed:) Filed Aug. 12, 1897, T. E. Newlin, clerk, by Geo. Varcoe, deputy. (Endorsed:) 32,447, Hooker *vs.* Burr; Plaintiff's Exhibit A—Filed Oct. 27, 1899, C. W. Bell, clerk, by Frank Dominguez, deputy.

I, Wm. A. Deane, county clerk of the city and county of San Francisco, State of California, and *ex-officio* clerk of the superior court, in and for said city and county, hereby certify the foregoing to be a full, true and correct copy of the original summons with affidavit of service on defendant April 23rd, 1897, in the above entitled cause, filed in my office on the 4th day of May, A. D. 1897.

Attest my hand and seal of said court, this 20th day of October, A. D. 1899.

[Superior Court Seal.]

WM. A. DEANE, *Clerk.*
By THOS. A. DAVIES,
Deputy Clerk.

(10c. I. R. stamp cancelled.)

Endorsed: 32447; Hooker *vs.* Burr; Plaintiff's Exhibit A. Filed Oct. 27, 1899. C. W. Bell, clerk. By Frank Dominguez, deputy.

Defendants continued thus: The judgment roll in the case of E. R. Nichols *vs.* Anna P. Spencer, No. 28,939 of the superior court of Los Angeles county was put in evidence, and the following is a copy of the said judgment roll, together with all the endorsements on the complaint therein:

125 In the Superior Court of the County of Los Angeles, State of California.

E. R. NICHOLS, Plaintiff,
vs.
ANNIE P. SPENCER, Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

I.

That on the 19th day of January, 1897, at the city of Los Angeles, county of Los Angeles, State of California, the said defendant made her certain promissory note in writing payable in gold coin of the United States, bearing date on that day, which said promissory note is in words and figures following, to wit:

"$875.00. JANUARY 19, 1897.

Six months after date, for value received I promise to pay E. R. Nichols, or order, at Merchants Nat. Bank, of Los Angeles, Cal., the sum of eight hundred & seventy five dollars, with interest at the rate of eight per cent. per annum from date until paid, interest payable semi annually and if not so paid, to be compounded semi annually and bear the same rate of interest as the principal; and should the interest not be paid when due then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Should suit be com-
126 menced to enforce the payment of this note, I agree to pay an additional sum of ten per cent. on principal as attorney's fees in such suit. Principal and interest payable in gold coin of the United States.

ANNIE P. SPENCER."

II.

That then and there said defendant delivered said promissory note to this plaintiff.

III.

That before the delivery of said note as aforesaid, and for the purpose of lending additional security thereto, one James Morgan indorsed said note as follows: "James Morgan. Presentment demand and notice of dishonor hereby waived. James Morgan."

IV.

That on the day of the maturity of said note, to-wit on the 19th day of July, 1897, said note was duly presented at the Merchants National Bank of Los Angeles, California, at said city of Los Angeles, the place where, by the terms therein, it was payable, and payment thereof duly demanded by a notary public, and payment thereof

was then and there refused and the same was on said 19th day of July duly protested for non payment thereof, and for protesting said note plaintiff was compelled to expend and did expend the sum of four (4) dollars.

V.

That by reason of the commencement of this suit, plaintiff has been compelled to employ attorneys in the prosecution of this action, and has incurred an indebtedness and obligated himself to pay to said attorneys for their services in this action the sum of
127 eighty-seven and 50-100 (87.50) dollars, by reason whereof he has suffered damage in the amount of said last named sum.

VI.

That plaintiff is now the lawful owner and holder of said note.

VII.

That no part of said note or of the interest thereon has been paid, and the same is now wholly due and unpaid.

Wherefore, plaintiff demands judgment against said defendant in the sum of eight hundred and seventy-five (875) dollars, with interest thereon at the rate of ten (10) per cent. per annum from the 19th day of January, 1897, for the further sum of four (4) dollars expended in protesting said note, with interest thereon from the 19th day of July, 1897, for the further sum of eighty-seven and 50-100 (87.50) dollars' damages incurred for attorneys' fees in prosecuting this action, and for costs of suit, and that said judgment be rendered and made payable in United States gold coin, pursuant to the terms of said note.

GROFF & WATERMAN,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

Jesse F. Waterman, being duly sworn, says that he is one of the attorneys for the plaintiff named in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to
128 the matters which are therein stated on information or belief, and as to those matters that he believes it to be true; affiant makes this affidavit for the reason that plaintiff is absent from the State of California.

JESSE F. WATERMAN.

Subscribed and sworn to before me this 19th day of Aug. 1897.
[SEAL.] M. K. YOUNG,
Notary Public in and for the County of Los Angeles, State of California.

In this action the defendant, Annie P. Spencer, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint, on file herein, and the time allowed by law

for answering having expired, the default of said defendant, Annie P. Spencer, in the premises is hereby duly entered according to law.

Attest: My hand and the seal of said court, this thirtieth day of September, A. D. 1897.

[SEAL.]

T. E. NEWLIN, *Clerk*,
By GEO. VARCOE, *Deputy*.

Endorsed: No. 28939—dep't 3. Title court and cause. Complaint. Filed Aug. 19, 1897. T. E. Newlin, clerk. By Geo. Varcoe, deputy. Groff & Waterman, Wilcox block, Los Angeles, attorneys for plaintiff.

129 In the Superior Court of Los Angeles County, State of California.

E. R. NICHOLS, Pl'ff,
vs.
ANNIE P. SPENCER, Def't.

Demurrer.

Comes now the defendant above named and demurs to the complaint of the plaintiff on file in this action, upon the ground that the said complaint does not state facts sufficient to constitute a cause of action.

E. H. LAMME,
E. E. MILLIKIN,
Attorneys for Defendant.

Sept. 13, 1897.

Demurrer of def't to plaintiff's complaint ordered to be and the same is hereby overruled.

Attest:

T. E. NEWLIN, *Clerk*,
By JOHN S. MYERS, *Deputy*.

Endorsed: No. 28939, dept. 3—Title of court and cause—Demurrer. Filed Sep. 7 1897. T. E. Newlin, clerk, by H. G. Miller, deputy.

Notice of the overruling of the demurrer was given more than ten days before the judgment was given, and no answer was filed within the time prescribed by law after such notice.

130 State of California in and for the County of Los Angeles.

E. R. NICHOLS, Plaintiff,
vs.
ANNIE P. SPENCER, Defendant.

Action brought in the superior court of the State of California in and for the county of Los Angeles, and the complaint filed in said county of Los Angeles, in the office of the clerk of said superior court.

The People of the State of California send greeting to Annie P. Spencer, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the superior court of the State of California, in and for Los Angeles county, and to answer the complaint filed therein within ten days (exclusive of the day of service), after the service on you of this summons, if served within this county; or, if served elsewhere, within thirty days.

This said action is brought to recover judgment against you in the sum of $875.00 with interest thereon at the rate of ten per cent. per annum from the 19th day of January, 1897, alleged to be due by the terms of a certain promissory note made and delivered by you on that day in favor of and to said plaintiff; also in the further sum of four dollars expended by said plaintiff for protesting said note with interest thereon from the 19th day of July,
131 1897; also in the further sum of eighty-seven and 50-100 dollars damages incurred by reason of employing attorneys in prosecuting this action, and for costs of suit. Reference is had to complaint for particulars.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will cause your default to be entered, and will take judgment against you for the sum of $875.00, with interest thereon at the rate of ten per cent. per annum from the 19th day of January, 1897, for the further sum of four dollars with interest thereon from the 19th day of July, 1897, and will also apply to the court for the further relief demanded in the complaint.

Given under my hand and the seal of the superior court of the State of California, in and for the county of Los Angeles, this 19th day of August in the year of our Lord one thousand eight hundred and ninety-seven.

[SEAL.]

T. E. NEWLIN, *Clerk*,
By GEO. VARCOE,
Deputy Clerk.

Endorsed: Filed Sep. 30, 1897. T. E. Newlin, clerk. By Jno. S. Myers, deputy.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

James P. Vroman, being duly sworn, deposes and says: that he is and was on the day when he served the annexed summons, a male citizen of the United States over the age of eighteen years and not a party to the within entitled action; that he received the an-
132 nexed summons in said action, on the 19th day of August, 1897, and personally served the same upon Annie P. Spencer, the within named defendant, on the 21st day of August, 1897, by delivering to Annie P. Spencer, the said defendant, personally, in the city of Los Angeles, county of Los Angeles, and State of California, a copy of said summons attached to a true copy of the complaint in said action therein named; and further deponent sayeth not.

JAMES P. VROMAN.

Subscribed and sworn to before me this 29th day of September, 1897.

[SEAL.] JESSE F. WATERMAN,
Notary Public in and for the County of Los Angeles, State of California.

In the Superior Court of the County of Los Angeles, State of California.

E. R. NICHOLS, Plaintiff,
vs.
ANNIE P. SPENCER, Defendant.

Judgment.

This cause coming on regularly for trial on the 30th day of September, 1897, upon the complaint filed herein, taken as confessed by said defendant, whose default for not answering thereto has been duly entered, and the court having heard and considered the proofs necessary to enable it to render judgment herein, and it ap-
133 pearing to the satisfaction of the court that there is now due to the plaintiff from the said defendant for principal and interest upon the note mentioned and set forth in the complaint herein, and for damages by reason of plaintiff having obligated himself to pay his attorneys for their services in this action, and for money expended by said plaintiff in protesting said note, the sum of one thousand fifteen and $\frac{30}{100}$ (1015.30) dollars, which sum is to draw and bear interest from date hereof at the rate of seven (7) per cent. per annum, and that all the allegations in said plaintiff's complaint contained are true, now, therefore, by reason of the premises, and on motion of Groff & Waterman, Esqs., counsel for said plaintiff,

It is ordered, adjudged and decreed, that E. R. Nichols, the plaintiff, do have and recover of and from Annie P. Spencer, the defendant, the sum of one thousand fifteen and $\frac{30}{100}$ (1015.30) dollars, with interest thereon at the rate of seven (7) per cent. per annum from

date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of $—.

September 30th, 1897.

WALDO M. YORK,
Judge of the Superior Court.

Endorsed: No. 28939, dept. 3, in the superior court of Los Angeles county, State of California. E. R. Nichols, plaintiff, *vs.* Annie P. Spencer, defendant. Judgment. Filed Sep. 30 1897. T. E. Newlin, clerk. By C. G. Keyes, deputy. Docketed Oct. 1, 1897. Entered Oct. 1, 1897. Book 72, page 233. By Geo. E. Ross, deputy clerk. Groff & Waterman, Wilcox building, Los Angeles, attorneys for plaintiff.

134 A. W. RHODES, called on behalf of the defendants, being sworn, testified: I got possession of this property from Mrs. Spencer when I received my deed.

At the time I got the sheriff's deed to this property, Mrs. Spencer was in possession of it, and she surrendered the possession to me. I attempted to make an offer of this redemption money to Mr. Hooker, but I did not get to see him. I went to his place of business, and to his house, with the money, but I did not get to see him. The day before I redeemed, I telephoned to Mr. Hooker's place of business, and he answered the telephone, and I asked him, "Is this Mr. Hooker," or if he was in, and they told me he was and he would come to the telephone. And I telephoned and I asked if that was Mr. Hooker, and he said "Yes," and I asked him if he would be at his place of business the next day at two o'clock, and he said yes, and wanted to know who it was, and what the busines was. I told him my name and the business was I was redeeming all the Spencer property, and I asked him if he held a certificate of purchase for the piece of Broadway property, lots and so on, and he said yes, and he asked me if I was going to redeem them. And then he says, "I don't know whether I can be with you." Well, I says then, "Nothing more, Mr. Hooker, I will come down to your place." And he said, "Well then—," and put up the telephone. And I went down with Mr. Anderson at two o'clock, and the party in charge told us he wasn't in. And that night I took the gold coin and went with Mr.

135 Anderson down to his house, and didn't succeed in seeing him. The girl that came to the door told Mr. Anderson that he was in, and if he would come in and take a seat he would come in in a few minutes. And we went in and took a seat, and the girl came back in about ten minutes, and said he was not in and didn't think he would be back that night. I redeemed all of the properties of that Spencer estate; all the city property and the ranch. There was two or three of these little pieces, out at El Monte and out there, I didn't. I had a talk with Mr. Shepherd in regard to the property; the Broadway, he said he didn't claim and never intended to redeem. He said he never intended to redeem that, and that was our property. He made no contention over that redemption.

Cross-examination:

I never saw Mr. Hooker up to the time I was telephoning to him. I never saw him until this morning. I never had any conversation with him only over the telephone.

Q. When you settled with Mrs.—when Mrs. Spencer turned over the possession, how much did you pay her?

A. Well, they paid me $42,000.

Q. Who were they?

A. Why, Mr. Shepherd.

Q. And you turned them over what?

A. I turned them over the ranch property and the two Spring-street and running through to Main. Mrs. Spencer turned over this property to me.

Q. Well, then, it was in the same deal when you got your
136 $40,000 and turned them over this ranch property, and what you turned over to them, you got the rest of it, didn't you?

A. Well, I got—well, I got the rest of it because they didn't redeem them—their right of redemption had run out before we made the settlement. I had the sheriff's deed.

Q. Well, that settlement you had was a settlement of all controversies between you and Mrs. Spencer and Shepherd, was it not?

A. Oh, it settled all our differences.

By the COURT:

Q. Was this Broadway property taken into consideration forming a part or parcel of the settlement between you and Shepherd?

A. No, sir, I already had that before we made our settlement.

Q. I thought you told me they gave you possession as a part of that settlement?

A. Mrs. Spencer did. I wanted possession. I spoke to Judge Variel in paying the money, and I says, "Now, here about this property, your time of redemption is out on this. You say you lay no claim to this." He says, "No, we lay no claim to this, and never did." And I says, "I would like to have possession of it." And Mr. Shepherd says, "I can't give you possession, but Mrs. Spencer will," he says, "she will give it to you; she understands this is your property." And then Judge Lamme indicated a time that she would give it to me, and she was away; and the next day she came back, and I went down, and she gave me possession of the property.

By Mr. CHAPMAN:

Q. Now when you say that you already had it, you mean
137 that by this redemption which is the subject of controversy here, you had obtained the sheriff's deed or were about to obtain it?

A. Their time for redemption had gone by, by several days, and I went down the next day, and the sheriff gave me the deed, or maybe it was the same day, but their time had run out, their time of redemption.

J. MURIETTA, called on behalf of the defendants, and being sworn, testified:

Am deputy sheriff, and the clerk in the sheriff's office. I have the papers in regard to the redemption of the piece of property that Mr. Rhodes redeemed at the Hooker sale.

Q. When that money was placed in there by Mr. Rhodes to redeem this property, did you notify Mr. Hooker that the money was there, and offer to pay him the money?

A. I telephoned to him. I got an answer. Then they told me to refer the matter to Mr. Chapman, his attorney. Then I notified Mr. Chapman, and I believe Mr. Chapman came next morning and examined the papers in the office.

Neither Mr. Hooker nor Mr. Chapman, during the time that money remained there after it was paid in by Mr. Rhodes, ever made any application for a sheriff's deed until after the deed was made to Mr. Rhodes.

Defendants also put in evidence the papers used by Rhodes in making the redemption including the notice, assignment of judgment, affidavits of Rhodes and certificate of clerk as to judgment.

138 Attorney for plaintiff stated that no question or objection was made as to the form and regularity and sufficiency of the redemption papers, and now makes no question as to same.

The plaintiff expressly stated and stipulated that there was no objection to the form of the redemption papers; that they were in due form, and were accompanied by all of the papers upon which he claimed the right to redeem, and that the only objections to said redemption upon which the plainriff relied or contended for were that the payment was made by a certified check and not in money, and that the amount was not sufficient, and that Rhodes had no right to redeem because the title to the property had passed out of Mrs. Spencer before the judgment in the Nichols case, upon which the redemption was given or docketed. And for that reason that no point is made as to the form of the redemption papers, including the sheriff's certificate of redemption, copies thereof are omitted.

Here the defendants rested.

JOHN D. HOOKER, recalled, testified in rebuttal as follows:

At the time when these redemption proceedings were attempted by Mr. Rhodes, I did not have any notice, knowledge, information or intimation of any kind that the title of this property was other than as it appeared of record.

Counsel for the plaintiff then offered in evidence the deed from Isabel Spencer and James G. Spencer, by Leon F. Moss, their attorney in fact, and Charles J. Shepherd, and Francesca Shepherd, his wife, to A. W. Rhodes, executed Feb. 13th, 1899, recorded

139 Feb. 18, '99, in Book 1289, page 21, of deeds, for a recited consideration of $500. This deed was a quitclaim deed of the particular property in controversy here, and also other property.

Defendants then put in their evidence the statement from the

books of Shepherd testified to by the witness, Dickey, of which said statement the following is a copy:

Telegraphic address: Winthrop, California. Mail address: P. O. box 543, Los Angeles.

Statement.

Telephone 905.

Los Angeles, Cal., ——, 189–.

Bought of C. J. Shepherd, fruit packer and shipper and general produce dealer.

Special attention to car load orders.

Packing house, Winthrop station, S. P. Co., corner Main and Jefferson Sts.

		To balance, per statement rendered			
1896.		To mdse. per bill rendered.			
Nov.		For water	15.		
1897.					
			400		
	Jan.	18.	Bal 380 rent	20.	
140	June	10.		250	
		17.		250	
		22.		250	
Oct.	18.			30	
Dec.	18.			380	
1898.					
Jan'y	26.			433.06	
Feb.	3.			100	
May	19.			81.60	
Dec.	9.			300.00	2109.66
1896.					
Jan'y	1.	Settlement			1340.00
		Paid Duque			1418.00

Endorsed: Book acc't. Defendants' Ex C. Filed Oct. 27th '99. C. W. Bell, clerk. By Frank Domingues, dep.

A. W. Rhodes, recalled in rebuttal.

Q. Mr. Rhodes, a deed has been introduced in evidence here, from Isabel Spencer, and others, including Mr. Shepherd, to you—that deed includes other property—will you explain to the court why that deed was made?

A. Isabel Spencer had a suit against me claiming that my redemption was subject to their suit in the superior court, and they were suing me at that time, and so I wanted a dismissal of that suit against me.

By Mr. CHAPMAN:

Q. Who was suing you?

A. Isabel Spencer claimed that my redemption was sub-
141 ject to their suit here in the superior court, decreeing a one-third of the property to Anna P. and two-thirds to Isabel Spencer.

By the COURT:

Q. I understand you paid $500 for the settlement of that suit, you say?

A. Well, I didn't pay anything. Judge Variel fixed up the papers. I said, I want that suit fixed, that suit dismissed, and he fixed it up, and drawed up a quit-claim deed.

It was here agreed that Mr. Variel might submit with the papers in the case, a written statement of what was settled between the parties at that time, and that the same should be received as evidence in the case.

The following is a copy of the statement prepared by Mr. Variel, and which was filed as evidence in the case under the stipulation:

In the Superior Court of the County of Los Angeles, State of California.

JOHN D. HOOKER, Plaintiff,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants. } No. 32447.

General statement of settlement of the litigations affecting the property of Anna P. Spencer, made by R. H. F. Variel during the month- of January and February, 1899, on behalf of and as attorney for Charles J. Shepherd.

The attorneys in the above cause having requested that I
142 prepare a statement setting forth as briefly as possible the above settlement, the following is respectfully submitted:

First. Isabel Spencer, as the assignee of the claims of the heirs of Ambrose H. Spencer, deceased, had brought suit against Anna P. Spencer to have certain properties standing on the public records of Los Angeles county adjudged to belong to the estate of Ambrose H. Spencer, deceased. Judgment went in favor of the plaintiff, and the defendant had appealed to the supreme court, and the case was pending therein as L. A. No. 501. Following the trial of this case in the superior court, and pending the decision in the supreme court, a number of other suits had been brought, all affecting the property, more or less. Some of these latter suits were litigations supplementary to the original Spencer suit, while others grew out of controversies arising out of the foreclosure of various mortgages on the different properties, and out of judgments rendered against Anna P. Spencer.

Isabel Spencer was represented by Leon F. Moss and J. W. Swanwick. Charles R. Bishop and his interests were represented by J. A. Graves. Wesley Clark and A. W. Rhodes, were represented by Anderson & Anderson and George J. Denis, John Burr was represented by Judge Hatch. Frank M. Kelsey, administrator, was represented by Allen & Flint. Anna P. Spencer was represented by E. H. Lamme, and Charles J. Shepherd by myself.

Extended negotiations were carried on through the entire month of January and the first half of February, 1899, with all
143 these parties, before a settlement could be made. Some general features of the settlement are set forth in three letters, two of them addressed by me to J. W. Swanwick, under date of February 2nd, 1899, and a third under date of January 31st, 1899, addressed by Anna P. Spencer to Charles J. Shepherd. These three letters are as follows:

R. H. F. Variel, attorney & counselor at law, rooms 8, 9, & 10 Abstract building, Los Angeles, Cal.

(Copy.)

LOS ANGELES, CAL., *February 2nd*, 1899.

J. W. Swanwick, Esq., Los Angeles, Cal.

DEAR SIR: In view of our negotiations over the various controversies growing out of the Spencer litigations, and over the property heretofore claimed by Isabel Spencer, it becomes necessary to have an arrangement made with Mr. A. W. Rhodes, in the event a settlement is effected.

I am willing in behalf of Mr. Charles J. Shepherd, to say that provided we can effect a settlement, as heretofore talked of between myself on the one hand, representing Mr. Shepherd, and you on the other representing Isabel Spencer, Mr. Charles R. Bishop, Mr. Moss and yourself, and also representing Frank M. Kelsey, as administrator of the estate of Ambrose H. Spencer and his attorneys, that Mr. Shepherd will settle with Mr. Rhodes by the payment of the following sums of money, made up of the following items, to wit:

144 Full amount of Lamme judgment and interest to date..... $2,990.86
Full amount of Nichols judgment and interest to date... 1,112.02
Full amount of Fish judgment held by Wesley Clark, with interest on the same to date..... 872.91
Full amount of advances made by Rhodes to redeem the ranch from the sale made under the Bishop foreclosure to Rolph..... 29,923.50
Interest and percentage on same to date of redemption by Shepherd and paid by Shepherd to the sheriff when he redeemed 598.46

Making a total to be paid to Rhodes in satisfaction of the above items of..... $34,497.75

In consideration of this, Mr. Shepherd is to receive from Mr. Rhodes and Mr. Clerk, either assignments of these judgments or written satisfactions of the same, and as well quitclaim deeds to all the Spencer properties, except the Olive Street property, and the Broadway property.

It is understood that so far as these are concerned, Mr. Rhodes is to retain his interest in the Olive-street and Broadway properties.

It is further understood that Variel will release to Mr. Rhodes any right of redemption which he, Variel, holds under his judgment to the Broadway property. The suit of Wesley Clark *v.* Shepherd is to be dismissed,—each party paying his own costs; the judg-
145 ment to be one in bar against any further action by this plaintiff or his assigns upon the same subject-matter.

Any further stipulations or quitclaims necessary to enable Shepherd to acquire a perfect and unincumbered title to all these properties other than the Broadway and Olive Street properties, are to be executed by Messrs. Rhodes, Clark and all parties in interest with them and their several attorneys. If Mr. Rhodes will accept the above propositions and undersign such acceptance on the bottom of this letter, it will facilitate matters.

Yours truly,

(S'g'd) R. H. F. VARIEL.

R. H. F. Variel, attorney & counselor at law, rooms 8, 9 & 10 Abstract building, Los Angeles, Cal.

LOS ANGELES, CAL., *February 2nd*, 1899.

J. W. Swanwick, Esq., Los Angeles, Cal.

DEAR SIR: I send herewith another letter to you which you are to use in your negotiations with the attorneys for Messrs. Rhodes and Clark in the matter of effecting a settlement of all the litigations, contests and questions growing out of the Spencer estate and property. If you can make such settlement with Mr. Rhodes, so as to bring in all others in interest, as stated in the accompanying letter, then in behalf of Mr. Shepherd I am willing to say to you
146 that he will settle with your client, Isabel Spencer, with yourself and Mr. Moss attorneys for Isabel Spencer, and also with Charles R. Bishop, as follows:

Mr. Shepherd will execute to Isabel Spencer, or to any other party whom you may designate, a grant, bargain and sale deed of the El Monte property, and being block F of the Freer tract; it is understood that the title is to be unincumbered. Variel holds a judgment for $1000 against Shepherd and Mrs. Spencer. He will release this tract from his judgment. The other judgments against Anna P. Spencer are to be satisfied and discharged. Mr. Shepherd will also consent that you take $13,000 of the moneys in the hands of Mr. Henry Weyse, receiver of the property, pending in the case of Isabel Spencer *vs.* Anna P. Spencer, the residue of the moneys in Mr. Weyse's hands to be applied on his charges, fees, etc., to be allowed by the court, and if any deficiency in the payment of such fees and charges

exist, Mr. Shepherd will pay the same. If there be any over-plus, this is to be delivered to Mr. Shepherd.

You are to procure the execution of such stipulations for judgments in the various suits as will clear all the titles to all the lands conveyed tc Shepherd by the deed from Orange E. Dickey. As incidental to this, you are to arrange to get a release by Charles R. Bishop of his claims filed in the matter of the estate of Ambrose H. Spencer, and also procure from Mr. Bishop a consent that he will accept the moneys paid to the sheriff on the redemption from him by Rhodes, amounting to $29,923.50, and have such quitclaims
147 from Isabel Spencer and Charles R. Bishop as may be required; and also have such proceedings taken in the matter of the estate of Ambrose H. Spencer by Frank M. Kelsey, the administrator, and his attorneys, Flint & Barker, as will close out said estate proceedings, so that the same will no longer appear as an incumbrance. The precise details of this I have not determined on, but it is to be done in pursuance of my request so as to fully clear all titles.

You are also to procure such further quitclaims, stipulations and agreements to be made as may be required to fully and completely convey the title to all these properties to Mr. Shepherd and furnish proper stipulations whereby in the case in the supreme court, a judgment of reversal shall be forthwith ordered entered, with directions to the lower court to enter judgment that plaintiff take nothing by her action, that the same be dismissed, such dismissal to constitute a bar to any further proceedings of any kind on any of the matters set forth in the pleadings therein.

I do not recall any other particular point of consequence, except that the receiver will be at once expected to make his final account and report, and the court on stipulations direct the payment of the money.

The preparation of the various satisfactions of judgment, quitclaim deeds and stipulations can be at once inaugurated. They can be all signed and when they have all been delivered, we will give a stipulation authorizing the court to enter an order directing the receiver to pay over the $13,000, and also deliver the deed to the El Monte property.

I would suggest that you express your concurrence in the
148 points of this letter with an additional statement of any other matters that may be necessary to clear it up.

Yours truly,

(S'g'd) R. H. F. VARIEL.

P. S.—It may be I may want some of these judgments put in a trifle different form, but that is a matter of detail which you will undertake to conform to.

R. H. F. Variel, attorney & counselor at law, rooms 8, 9 & 10, Abstract building, Los Angeles, Cal.

(Copy.)

LOS ANGELES, CAL., *January* 31*st*, 1899.

Charles J. Shepherd, Esq., Los Angeles, Cal.

DEAR SIR: I am informed by your attorney, Mr. R. H. F. Variel, in presence of my own attorney, Mr. E. H. Lamme, that there is a prospect that you can settle the various litigations growing out of the controversy between Isabel Spencer and myself, the Spencer estate, and the various mortgage foreclosures and sales, etc., affecting the property. I am informed further that as the result of such settlement, you will have to pay in the aggregate, a very large sum of money, amounting to $60,000—or thereabouts, in order to terminate all these litigations, and that as the result of it, you will obtain a clear and unincumbered title to the Ranch property of 94 acres, subject to the Chinaman's lease, to the Spring Street property, and to the Main Street property.

149 Your attorney reminds me of my testimony given at the time my deposition was taken, confirmed by your own testimony, namely, that I absolute- sold and conveyed all this property to you, to do as you would with it, with the understanding that you were to use your own judgment in advancing money and funds for its protection, for the defense and prosecution of such litigations as you thought proper, or which you felt you could afford, and that when the whole matter was finally ended, if you felt that anything remained in your hands after compensating yourself, which would justify you making a further payment to me, that then it was left to your discretion to make such payment to me of such a sum of money as you thought right and fair.

I now confirm this statement and understanding.

I am further informed by your attorney that it is your desire that I should relieve you from determining what you might consider fair as the result of all this business,—that you feel that you have been compelled to advance a very large sum of money,—that you have had to face a great many litigations, and take many more responsibilities than were originally anticipated, and that you do not wish to be left in a position of determining what might be a fair payment to me after this business is all concluded, and you have realized on the property, and that you prefer to have me state to you what I would be entirely satisfied to receive out of the net profits ultimately realized by you from the above property.

Responding to your request, I declare that if you will go ahead and make this settlement and acquire the title to these prop-
150 erties, that I will be entirely satisfied if you will pay to me, when you have reimbursed yourself for all advances or expenses whatsoever made by you, for any purpose in connection with this property, including all your advances for attorneys' fees, taxes, redemptions, settlements, or the payment of any other expenses or

charges, together with interest on such advances from the time they are made, up to the time you are reimbursed for them out of the property, at the rate of eight per cent. per annum, and also after reimbursing yourself for your time, energy and attention to this case, and the risk you have taken in advancing money, by retaining yourself for such services a further amount of five thousand dollars, which $5,000 will cover your services up to dute only, and then by retaining such further reasonable compensation for your further trouble, in the handling of the property until you actually realize upon it, as is in your judgment fair, that then I will be satisfied to accept, out of the net profits of the property coming to you, remaining after making all the above reimbursements and payments, one-half thereof, when such profits shall have been received by, or shall have accrued to you.

I am absolutely without means, and would like you to make some arrangement from time to time whereby I can be paid some small sum monthly for my actual, necessary living expenses. I wish it understood that you assume and pay in this connection on my indebtedness to my attorney, Mr. E. H. Lamme, the sum of $1,000.

The foregoing letter is not to be treated as a declaration or intimation by me, that I have or claim or assert in any manner, any
151 right or interest in or title or equity to, the property hereinbefore conveyed to you by me, or in its proceeds, but the facts regarding the matter, are as stated in your testimony and mine at the time our depositions were taken, and I state further, that this letter is written solely and only at your request, acting through your above-named attorney for the purpose of enabling you to be fully informed at the present time just what is expected of you by me, so that you may be fully advised in the event you are able to make such settlement.

Yours truly,

(S'g'd) ANNA P. SPENCER.

Witness:

THOS. F. KEEFE.

That portion of the settlement which touched Mr. Rhodes was very considerable, by reason of the large interest he had acquired through his purchase of the Lamme judgment, the Nichols judgment and the Fish judgment, each against Anna P. Spencer, and his redemption from the sale of Rolph of the ranch property, and from his claims to the Olive Street property and to the Broadway property.

The several items of Mr. Rhodes' many demands and claims are set forth specifically in the statement hereinafter contained.

In order that nothing might be overlooked at the time of the settlement, I prepared a schedule or "list of documents" to be drawn by me and signed by the various parties, and of things to be done, in order to clear up and perfect the title in the ranch property, in the Main Street property, and in the Spring Street property, includ-

ing a small lot east of Alameda street, in Charles J. Shepherd,
152 also to perfect the title to the El Monte property in Leon F. Moss, and to vest in A. W. Rhodes the Olive Street property, together with whatever rights or claims were then asserted against the Broadway property by Shepherd, Mrs. Spencer, myself and the other parties in interest, subject to the controversy involved in this action between Mr. Rhodes on the one hand and Mr. Hooker on the other.

In other words, Mr. Rhodes was to take in addition to the money payment as part of his share of this settlement, whatever rights, claims or possessions were vested in any of these parties to this settlement in the Broadway property, and he was to litigate all matters at issue or in controversy with J. D. Hooker, Esq., at his own risk and cost.

This feature of the settlement was suggested by me personally to A. W. Rhodes and his attorneys, as an inducement to get Mr. Rhodes to join in the settlement that was finally carried out. See the letter of date of February 2nd, 1899, to J. W. Swanwick, where the matter is generally mentioned as a feature of the settlement.

The quitclaim deed from Shepherd to Rhodes, being No. 18, in the list of documents hereinafter contained, and the letter of E. H. Lamme to A. W. Rhodes, being No. 20 referred to in the list of documents, were executed in pursuance of and as part of the settlement. The letter of Lamme to Rhodes was addressed to him as the letter of Anna P. Spencer, by E. H. Lamme, her attorney, and the following is a true copy of that letter:

(Copy.)

(No. 20 in list of documents.)

153 LOS ANGELES, CAL., *February 14th*, 1899.

A. W. Rhodes, Esq., Los Angeles, Cal.

DEAR SIR: The undersigned, Mrs. Anna P. Spencer, undertakes and agrees that she will, in consideration of the settlement and adjustment of all the litigations heretofore existing between herself and Isabel Spencer over real and personal property in the county of Los Angeles, California, and the settlement and adjustment by all the various parties in interest in said litigations with Charles J. Shepherd, to deliver the possession of the premises described as lot 3 and the southerly 17½ feet of lot 4 in block 52 of the Huber tract, in the city and county of Los Angeles, State of California, acquired by bargain and sale deed from John Liever, dated August 30th, 1887, recorded in Book 302, page 58, of deeds, records of Los Angeles county,—to you, said A. W. Rhodes, or to your written order, on or before the first day of March, 1899.

MRS. ANNA P. SPENCER,
By E. H. LAMME, *Her Attorney.*

Witness:
THOS. F. KEEFE.

A copy of the list of documents to be prepared, signed and delivered, and of things to be done, in order to accomplish these various points, as made up by me at the time of the settlement, and as corrected and as added to until the entire settlement was concluded, is as follows:

List of Documents.

1. Isabel Spencer *vs.* Anna P. Spencer. Supreme court
154 (L. A. No. 501). Stipulation for judgment. Sent stip. to clerk of supreme ct. with a request to have chief justice make order thereon. See letter.

2. Frank M. Kelsey, administrator, *vs.* Anna P. Spencer, superior court (No. 30831). Stipulation for judgment.

3. Isabel Spencer *vs.* A. W. Rhodes (No. 31371). Stipulation for judgment. Judgment signed Feb. 17, '99, and filed. Stip. also.

4. Wesley Clark *vs.* Anna P. Spencer (No. 31979). Stipulation for judgment signed and filed. Also stip. Feb. 17, '99.

5. John Burr *vs.* A. W. Rhodes (No. 31982). Stipulation for judgment. Judgment signed and filed. Also stip. Feb. 17, '99.

6. Isabel Spencer *vs.* Charles J. Shepherd (No. 32085). Stipulation for judgment. Judgment signed and filed. Also stip. Feb. 16, '99.

7. Charles R. Bishop *vs.* W. A. Hammel, sheriff (No. 32091). Stipulation for judgment and dismissal of mandamus proceedings. Judgment signed and filed. Also stip. Feb. 17, '99.

8. Isabel Spencer *vs.* Anna P. Spencer (No. 25,564). Stipulation for distribution of funds. Filed in depart. 5, Feb. 15, '99.

9. John Burr *vs.* A. W. Rhodes (No. 31,982). Instructions to sheriff on payment of money.

10. Jane Ann Newton *vs.* Anna P. Spencer (No. 20070). Stipulation showing full satisfaction of defendant's claim for costs, amounting to $35.50. Given to L. F. Moss.

155 11. Jane Ann Newton *vs.* Anna P. Spencer (No. 20452). Stipulation showing full satisfaction of defendants' claims for costs amounting to $67.30. Given to L. F. Moss.

12. Charles R. Bishop *vs.* W. A. Hammel (No. 32,091). Direction as to payment of money to Charles R. Bishop. Given to J. A. Graves.

13. Power of attorney, Isabel Spencer and James G. Spencer to Leon F. Moss, dated Dec. 9, 1897. Recorded Feb. 14, '99.

14. Power of attorney, Charles R. Bishop to John H. Spring, dated Dec. 27, 1898. Recorded Feb. 14, '99.

15. Deed (quitclaim), Anna P. Spencer to Charles J. Shepherd, dated February 2, 1899. Recorded Feb. 14, '99.

16. Deed, Charles R. Bishop, Isabel Spencer, James G. Spencer, Leon F. Moss and Effie L. Moss, to Charles J. Shepherd, dated February 11, 1899. Recorded Feb. 14, '99.

17. Deed, Charles J. Shepherd to Leon F. Moss. Given to Moss.

18. Quitclaim deed, Charles J. Shepherd *et al.*, to A. W. Rhodes. Given to Rhodes.

19. Letter, Charles J. Shepherd to Leon F. Moss, delivered to Moss.

20. Letter, E. H. Lamme to A. W. Rhodes. Delivered to Rhodes.

21. Assignment, A. W. Rhodes to Shepherd, of certificate of redemption, covering 94 acre tract. Delivered to Variel for S.

22. Assignment by Rhodes to Shepherd of certificate of sale
156 covering part of block 23, Ord's survey. We have it for S.

23. The following receipts have been taken from—

(*a.*) E. H. Lamme, for $900, dated Feb. 1, 1899. Check delivered.

(*b.*) A. W. Rhodes, for check for $1320.29, and an order on the sheriff in favor of Rhodes for $4753.96, and consent that Rhodes take from First national bank $29,923.05. Check ordered delivered.

(*c.*) Receipt from L. F. Moss for $10455. Check delivered.

(*d.*) Receipt from J. A. Graves for $3545. Check delivered.

(*e.*) Receipt of J. A. Graves for $1000. Check delivered.

24. Emma R. Lamme *v.* Anna P. Spencer (28,808). Satisfaction of judgment. Judgment satisfied Feb. 14, '99.

25. E. R. Nichols *v.* Anna P. Spencer (No. 28,939). Satisfaction of judgment. Judgment satisfied of record Feb. 14, '99.

26. Howard J. Fish *v.* Anna P. Spencer. Satisfaction of judgment. Judgment satisfied Feb. 14, '99.

27. R. H. F. Variel *v.* A. P. Spencer. Satisfaction of judgment. Judgment Feb. 14, '99.

As part of the settlement the letter hereinbefore referred to dated January 31st, 1899, and addressed by Anna P. Spencer to Charles J. Shepherd, was written. And subsequently, when the deal was closed Anna P. Spencer indorsed on the back of that document a receipt showing the payment to her of the money mentioned
157 in, and being voucher No. 2 appended to the general statement hereinafter contained.

Lastly, after the settlement was finally concluded and all payments had been made, and the various documents signed and delivered, and the several judgments mentioned were either entered or satisfied, as was required in order to perfect the settlement, I prepared a general statement of the whole business done by me, and showing the moneys received by me and paid out, and how applied, and otherwise fully showing to Charles J. Shepherd everything that I had done in his behalf in respect to the expenditure of moneys, and this document, finished and completed on March 10th, 1899, was delivered to Charles J. Shepherd at that time, and the following is a copy thereof:

Statement.

The following is a statement of the various amounts paid by Charles J. Shepherd on the various redemptions made of the Spencer properties under foreclosure sales, and also of the amounts paid by said Shepherd on the settlement up of all the Spencer litigations, and the acquiring of the title by said Shepherd to the ranch property, the Spring and Main Streets properties, and the lot in the Goldsworthy tract.

Ranch Property.

Dec. 13, 1898.—Paid sheriff of Los Angeles county on redemption of ranch property from A. W. Rhodes, who had heretofore redeemed from James Rolph, the purchaser of said property under the Bishop foreclosure, the total of..... $34,578.51

158 The total sum of $34,578.51 is arrived at in the following manner:

June 13,'98.—Property sold under foreclosure sale to Rolph for.....		$27500.00
Interest on same from date of sale to time of redemption by Rhodes, Dec. 8, '98, at 1 per cent.....		1604.23
Rolph paid city taxes, 1897, 1898, 1899, as appears from his demand for repayment of same.....	$321.36	
Also paid Co. taxes.....	411.86	
Also for making tax redemption.....	78.30	
Total taxes paid.....		811.52
Interest on tax payments from Nov. 11, '98, date of payment, to Dec. 8th, '98, at 1 per cent. per mo.....		7.30
Total amount paid by Rhodes to Rolph, on redemption made Dec. 8, '98.....		$29923.05
Interest on same from Dec. 8, '98, to Dec. 13, '98, date of redemption by Shepherd, at 2 per cent.....		598.46
159 E. R. Nichols judgment.	$1015.30	
Interest of same from date thereof, Sep. 30, '97, to Dec. 13, '98, at 7 per cent..	85.87	
Total Nichols judgment.....		1101.17
E. R. Lamme judgment.....	$2687.75	
Costs of suit.....	33.75	
Total Lamme judgment.....	$2721.50	
Interest from Sep. 25, '97 (date thereof) to Dec. 13, '98, at 7 per cent.....	232.83	
Total Lamme judgment.....		2954.33
Total.....		$34577.01
Sheriff's certificate of redemption.....		1.50
Total		$34578.51
Dec. 31, 1898.—Am't paid sheriff in addition, to cover any possible errors in calculations.....		$100.00
Grand total paid sheriff in redemption on ranch property.....		$34678.51

160 *Spring-Street Property.*

(Part of lot 4, bl'k 17, Ord's S.)

Jan 18, '99.—Charles J. Shepherd paid sheriff of Los Angeles county on redemption of this property from A. W. Rhodes, who redeemed August 16th, 1898, under the Lamme judgment from T. L. Duque, who was the purchaser thereof under the foreclosure sale in case brought by Main-street saving[illegible]nk, the sum of..... $7212.75

This amount paid, $7212.75, is arrived at in the following manner, to-wit:

August 16, 1898.—Amount paid T. L. Duque by A. W. Rhodes on his redemption.....	$6863.50	
Interest from Aug. 16, 1898, to Jan. 18, 1899, at 1 per cent. per month.....	347.75	
Total.....	$7211.25	
Cost of sheriff's certificate of sale.....	1.50	
Total paid sheriff.....		$7212.75

Main-Street Property.

(Part bl'k 23, Ord's S.)

Jan. 18, '99.—Charles J. Shepherd paid sheriff of Los Angeles county on redemption of this property from Charles R. Bishop, the assignee of James Rolph, who became the purchaser under the foreclosure sale..... $6690.93

161 This amount of $6690.93 is arrived at in the following manner, to-wit:

July 18, '98.—Sold to Rolph for.....		$6030.00
Interest on same at 1 per cent. per mo. from date of sale to Jan. 18th, 1899, date of redemption.....		361.80
Rolph paid Alcatraz Co. for paving.....	$65.15	
Interest from date of payment, July 27, '98, to redemption.....	3.79	
		68.94
Nov. 11, '98.—Rolph paid Co. taxes.....	$80.66	
Also city taxes.....	82.00	
Also for paving.....	61.03	
	$223.69	
Interest on same from Nov. 11, 1898, to date of redemption.....	5.00	
		228.69
		$6689.43
Sheriff's certificate of redemption.....		1.50
		$6690.93

In order to effect a settlement of all the litigation, it be-
162 came necessary to make the following payments to A. W. Rhodes, to-wit:

The total amount of the Lamme judgment		$2990.86
The total amount of the Nichols judgment		1112.02
The total amount of the Fish judgment		872.91
Cost of redemption from sale to Rolph		29923.05
Interest of same from Dec. 8th to Dec. 13, 1898		598.46
Additional raise in way of a bonus		500.00
Amount required to settle with Rhodes		$35997.30
Amount paid by Shepherd, less $1.50 sheriff's fee for certificate	$34677.01	
Cash paid to Rhodes by Shepherd	1320.29	
		$35997.30

Costs Paid by Mr. Charles J. Shepherd.

Paid county clerk for costs, as follows:

Appearance fees: Spencer *vs.* Rhodes	$2.00
" " Clark *v.* Shepherd *et al.*	2.00
" " Bishop *v.* Hammel, sheriff	2.00
" " Burr *v.* Shepherd *et al.*	2.00
" " Spencer *v.* Shepherd *et al.*	2.00
" " Spencer *v.* Spencer	2.00
Entering satisfactions of four judgments	1.00
Filing remittitur, Spencer *v.* Spencer	.50

Paid county recorder, the following fees:

Recording three certificates of redemption	3.80
Re-recording one certificate	1.40
Recording various deeds and powers of attorney	7.00
163 Recording satisfaction of creditor's claims against estate of A. H. Spencer, and having same released	2.50
Recording judgment, Spencer *v.* Spencer	2.20
Paid C. V. Anderson, copy of deposition of Anna P. Spencer and Charles J. Shepherd	13.80
Paid W. J. Variel, taking eleven notary acknowledgments	5.50
Paid half cost of I. R. stamps on deed of all parties to Shepherd on settlement	8.00
Paid half cost on I. R. stamps on deed to Moss	1.00
	$58.70

Account of Moneys that Went Through H. G. Weyse's Hands as Receiver.

(This will appear from his account filed March 2nd, 1899, in the original case of Spencer *v.* Spencer No. 25564.)

Cash received from various sources		$15219.48
Charges and costs of maintaining the property under receiver's charge	$548.47	
Amount paid Charles J. Shepherd, on order of court	14000.00	
		$14548.47
Balance in receiver's hands		$671.00
Court allowed receiver as compensation, (with a direction that should there be insufficient money in his hands to pay the same, that C. J. Shepherd pay the difference)		750.00
Cash balance in receiver's hands as shown above		671.01
Cash balance to be paid by Shepherd		$78.99

Summary of Amounts Paid by Charles J. Shepherd Through R. H. F. Variel of Settlement of all Matters.

Total amount paid sheriff on redemption of ranch property on December 13th, 1898, (see page 1)	$34678.51
Total amount paid sheriff on redemption of Spring-street property, Jan. 18th, 1899, (see page 2)	7212.75
Total amount paid sheriff on redemption of Main-street property on January 18th, 1899, (see page 3)	6690.93
Total balance due Rhodes on account of additional payment in the way of bonus, including the Fish judgment and interest thereon, and costs accrued on the two other judgments held by Rhodes, (see page 4). (See voucher No. 7)	1320.29
Total amount paid on costs of settlement, and costs in the various cases (see page 5)	58.70
Total amount paid on judgment of R. H. F. Variel, (see voucher 1 hereto annexed)	1000.00
Paid Mrs. Anna P. Spencer, (see voucher No. 2)	1000.00
Paid R. H. F. Variel, attorney's fees in various cases and for concluding settlement of all cases (see voucher No. 1)	1750.00
Paid E. H. Lamme, in full settlement of all demands against Mrs. Spencer (see voucher No. 3)	900.00
Paid H. G. Weyse, (being balance due him as receiver in Spencer *v.* Spencer, see page 6 hereof)	78.99
Paid Leon F. Moss, cash on full settlement (see voucher No. 4 hereto attached)	10455.00

Paid Charles R. Bishop, on settlement, (see voucher No. 5 hereto attached)	3545.00
Paid J. A. Graves, cash on settlement (see voucher No. 6 hereto attached)	1000.00
	$69690.17

Credit—

By cash received from H. G. Weyse, receiver, as per order of court, (see page 6 hereof)	14000.00
Total balance paid out by Shepherd	$55690.17

Charles J. Shepherd:

Herewith find report of the Spencer litigations and settlement covering this and six preceding pages, accompanied by seven vouchers with a schedule fully describing same, and,

166 We certify that all the above items are correct, and that the payment thereof (except of the item of $78.99 to H. G. Weyse), was made by said Charles J. Shepherd through the hands of the undersigned.

R. H. F. VARIEL,
Attorney for Charles J. Shepherd.

Attest: THOS. F. KEEFE.

Dated March 10th, 1899.

Voucher No. 1.

LOS ANGELES, CAL., *February 14th*, 1899.

The undersigned, R. H. F. Variel, hereby acknowledges the receipt of the sum of one thousand ($1000) dollars, from Charles J. Shepherd in full settlement and discharge of that certain judgment recovered by the undersigned against the said Shepherd and one Anna P. Spencer, in that certain action pending in the superior court of Los Angeles county, Cal., entitled, R. H. F. Variel, plaintiff, *vs.* Anna P. Spencer, *et al.*, defendants.

R. H. F. VARIEL.

The undersigned, R. H. F. Variel, hereby acknowledges the receipt of the sum of one thousand seven hundred and fifty ($1,750) dollars in full payment for legal services rendered Charles J. Shepherd, in the various litigations involving the title to the Spencer properties, and also in payment of all services rendered on the settlement of said cases, and in full of all demands to date.

R. H. F. VARIEL.

167 Voucher No. 2.

LOS ANGELES, CAL., *February 14th*, 1899.

This is to acknowledge that I have on the above-mentioned date received from Charles J. Shepherd the sum of one thousand dollars in United States gold coin, in ratification and confirmation of the agreement contained in the within and foregoing paper, and that such amount of $1000, is to be accounted for and considered in any final settlement made with me by said Charles J. Shepherd under and in pursuance of the foregoing instrument when he has finally realized upon the property mentioned therein and is to be repaid to said Shepherd out of any share in such profits apportioned to me on such final settlement.

ANNA P. SPENCER.

Witnesses:
R. H. F. VARIEL.
THOS. F. KEEFE.

Voucher No. 3.

LOS ANGELES, CAL., *February 1st*, 1899.

Charles J. Shepherd, Los Angeles, Cal.

DEAR SIR: I am informed by your attorney, R. H. F. Variel, Esq., that you have an opportunity to make a settlement of the Spencer litigations, whereby you will acquire the title to the 94 acres, to the Spring Street property and to the Main Street property, but in order to do so you will be compelled to pay, in order to meet all charges and expenses, together with what you have already
168 advanced, the aggregate sum of $60,000, or thereabouts.

I understand that you think it advisable to make this settlement, and you wish to know what sum would satisfy me, so far as you are concerned.

Replying to this, I am willing to accept the sum of $1000, cash, in gold coin, payable within thirty days after the completion of settlement, in full payment, satisfaction and discharge of my claims as attorney for services rendered Mrs. Anna P. Spencer in the various litigations in which she is now, and has in the past been, interested.

Yours truly, EDWIN H. LAMME.

I, Edwin H. Lamme, hereby accept nine hundred (900.00) dollars this 14th day of February, 1899, in full payment and satisfaction of the above obligation and acknowledge receipt of same.

EDWIN H. LAMME.

Voucher No. 4.

Memorandum of Settlement Made Between Charles J. Shepherd and Messrs. *Leon F. Moss, Representing Isabel Spencer and Her Interests.*

Mr. Shepherd is to receive from H. G Weyse, receiver, the sum of.....		$14,000.00
Of this amount Mr. Shepherd pays to Mr. Leon F. Moss, attorney for and representing the Isabel Spencer interests and covering all the interests in behalf of the plaintiff in the various suits brought by Isabel Spencer against Anna P. Spencer and others, the sum of.....	$10455.00	
Mr. Shepherd also pays to Mr. J. A. Graves, attorney for Charles R. Bishop, the sum of...	$3545.00	
Making a total of.....		$14,000.00

The undersigned, Leon F. Moss, and Isabel Spencer hereby acknowledge the receipt from Charles J. Shepherd, this 13th day of February, 1899, of the sum of $10455.00 in full settlement of all the stipulations, papers, and proceedings had in the matter of the adjustment, settlement and dismissal of the various suits now pending in the superior court of the county of Los Angeles, State of California, and in the supreme court of the State of California, growing out of the original suit of Isabel Spencer, plaintiff, *vs.* Anna P. Spencer, defendant, being cause No. 25564 in the superior court of the said county of Los Angeles, or involving or affecting the property concerned in such suit. It is understood and agreed that the above sum paid by the said Charles J. Shepherd covers the attorneys' fees of Messrs. Flint & Barker, and of J. W. Swanwich, in that certain action entitled Frank M. Kelsey, administrator of the estate of Ambrose H. Spencer, deceased, plaintiff, *vs.* Anna P. Spencer, *et al.*, defendants, and being cause No. 30831, in the superior court of said Los Angeles county, and also covers, the attor-
170 neys' fees of said Flint & Barker and the administrator Frank M. Kelsey, in the matter of the estate of Ambrose H. Spencer, deceased, pending in said superior court, including further the costs of said court and the costs of the plaintiff administrator in said probate estate.

Of the above amount of $3545—to be paid to Mr Graves—$1500 is to be paid by Mr. Bishop to Isabel Spencer.

LEON F. MOSS.
ISABEL SPENCER,
By LEON F. MOSS,
Her Attorney in Fact.

Voucher No. 5.

To R. H. F. Variel, Esq.:

You are hereby directed to pay to J. A. Graves the sum of $1,500.00 on account of Isabel Spencer, and the sum of $2,045.00 on account of Charles R. Bishop,—same being in conformity to the compromise agreed upon this date, of the Spencer litigation.

LEON F. MOSS.
ISABEL SPENCER,
By LEON F. MOSS,
Her Attorney in Fact.

Received the amounts called for by the above writing. Feb. 14, '99.

J. A. GRAVES.

Voucher No. 6.

FEB. 14, '99.

Received of Charles J. Shepherd the sum of one thousand dollars in U. S. gold coin on account of settlement between Charles J.
171 Shepherd & Charles R. Bishop (the latter acting through his att'y in fact, J. H. Spring).

J. A. GRAVES,
Att'y for Chas. R. Bishop.

Above payment was made in full and final settlement of the Isabel Spencer and Anna P. Spencer litigations, in superior court, Los Angeles county, Cal.
Feb. 14, '99.

J. A. GRAVES,
For Chas. R. Bishop.

Settlement with A. W. Rhodes Made by Charles J. Shepherd, Growing Out of the Spencer Litigations.

Shepherd is to make the following payments:

Pay the Lamme judgment	$2990.86
Pay the Nichols judgment	1112.02
Pay the Fish judgment	872.91
Cost of redemption from sale to Rolph and paid by Rhodes	29923.05
Interest on same deposited with sheriff by Shepherd	598.46
Addition raise in way of bonus	500.00
Total	$35997.30

Total amount to be paid Rhodes by Shepherd **$35997.30**

Amount deposited in First national bank to credit of A. W. Rhodes	$29923.05	
172 Amount in sheriff's hands to credit of Rhodes	4753.96	
Cash by check paid herewith by Shepherd to Rhodes	1320.29	
		$35997.30

The undersigned, A. W. Rhodes, acknowledges the receipt of a check for sum of $1320.29,—also an order on the sheriff of Los Angeles county, California, for the sum of $4753.96, and also acknowledges the receipt of the sum of $29923.05, deposited by sheriff of Los Angeles county, in the First National Bank of Los Angeles, to his, A. W. Rhodes' credit, and making the total sum of $35997.30.

Dated Feb. 14th, 1899.

A. W. RHODES.

Voucher No. 8.

FEB. 14TH, 1899.

Received of R. H. F. Variel the sum of one dollar, costs on entry and satisfaction of the following judgments:

(1.) Case of Emma R. Lamme *v.* Anna P. Spencer, No. 28808.
(2.) Case of E. R. Nichols *v.* Anna P. Spencer, No. 28939.
(3.) Case of Howard J. Fish *v.* Anna P. Spencer, No. 30952.
(4.) R. H. F. Variel *v.* Anna P. Spencer, case No. 31892.

173 I also acknowledge receipt of a satisfaction of judgment in each of the above cases for filing therein.

C. W. BELL, *Clerk*,
By C. G. KEYES, *Dep.*

Voucher No. 9.

LOS ANGELES, CAL., *Feb. 14th*, 1899.

Charles J. Shepherd to W. J. Variel, notary public, Dr.

To acknowledgments in the Spencer settlement:

Effie Moss, wife of Leon F. Moss	$.50
Chas. R. Bishop by J. H. Spring, att'y in fact	.50
Chas. R. Bishop by J. H. Spring, att'y in fact	.50
R. H. F. Variel, satisfaction judgment	.50
Isabel Spencer, by Moss, att'y in fact	.50
James G. Spencer, by Moss, att'y in fact	.50
Leon F. Moss (personally)	.50
Isabel Spencer, by Moss, att'y in fact	.50
James G. Spencer, by Moss, att'y in fact	.50
Charles J. Shepherd	.50
Charles J. Shepherd	.50
	$5.50

Received payment,

W. J. VARIEL,
Notary Public.

The foregoing is a full, true and correct statement setting forth the above settlement of the Spencer litigations made by me in behalf of Charles J. Shepherd.

There are many matters of detail connected with the various suits and controversies which I could furnish, but which
174 — nowise relate to the pending controversy, as I understand it.

Respectfully submitted,

(S'g'd) R. H. F. VARIEL.

Oct. 30th, 1899.

(Endorsed on the back as follows:)

No. 32447. Dept. —. In the superior court of Los Angeles county, State of California. John D. Hooker, plaintiff, *vs.* John Burr, A. W. Rhodes and W. A. Hammel, defendants. General statement of settlement of the litigation affecting the property of Anna P. Spencer, &c. Filed Jan. 24, 1900. C. W. Bell, clerk. Frank Dominguez, dep. R. H. F. Variel, Abstract building, rooms 8, 9, 10, 11, Los Angeles, Cal., attorney for —.

The suit of Mulligan *v.* Spencer, in the city and county of San Francisco, numbered 59,144, was a suit in which the plaintiff alleged that he had, on the 2nd of October, 1878, placed in the defendant's hands and deposited for safe keeping the sum of $10,000 in gold coin of the United States, and that it was received by her in trust for the plaintiff. That she had always acknowledged the trust until within two years before the commencement of the action, and that upon the request of the plaintiff prior to the commencement of the action, and while expressly acknowledging the trust, she had failed and neglected to return the money. There was a second count in the usual form of the common law count for money received to the use of the plaintiff, and a prayer for judgment against the defendant in the sum of $43,600 and costs of suit. The re-
175 demption papers referred to were in regular form and sufficient so far as the form of the necessary papers was concerned, and consisted among others of a notice addressed to John D. Hooker, purchaser at foreclosure sale and to John Burr, sheriff of Los Angeles county, in which it was stated that on the 13th of June, 1898, by virtue of the decree of foreclosure in the suit brought by Charles R. Bishop, No. 29,175, against Anna P. Spencer and others, to foreclose a mortgage executed by Anna P. Spencer, Ambrose H. Spencer to Jacob Swiggart, and assigned by him to said Charles R. Bishop, a sale had been made to Hooker as in the complaint stated, and stated that on the 30th of September, 1897, in an action pending in the superior court of Los Angeles county, State of California, wherein E. R. Nichols was plaintiff and Anna P. Spencer, the mortgagor, was defendant, judgment was duly rendered and entered in favor of E. R. Nichols for $1015.30 and costs, against such Anna P. Spencer, and that the judgment was docketed on the 1st day of October, 1897. That it had been assigned to the undersigned and that he was then the legal owner thereof, and that it re-

mained in force and was a valid and subsisting lien upon said mortgaged property subject to the lien under which it was sold. To which is added: "We now tender to you, said John D. Hooker, the sum of $10070 gold coin of the United States of America, in payment of the amount of this purchase by said John D. Hooker on the purchase at said sheriff's sale being $9500 and interest thereon as provided by law from June 13, 1898, and give you notice that I do hereby redeem said mortgaged property from said sale."

176 Then followed the description of the premises sought to be redeemed, and which was as follows:

"Situate in Los Angeles city and county, California, and being lot three (3) of the southerly seventeen and three-quarters (17¾) feet of lot four (4) of block 5 of the Huber tract, according to a map recorded in Book 2 at page 280 of the miscellaneous records in the office of the recorder of Los Angeles county, State of California. Dated November 12, 1898. (Signed A. W. Rhodes. Acknowledged by A. W. Rhodes before C. V. Anderson, notary public.)"

Attached thereto was a power of attorney from E. R. Nichols to Louis A. Groff, authorizing him to sell, assign, transfer and set over unto any person or persons, or a corporation or corporations as purchasers, a certain judgment obtained in the superior court and reciting the judgment above mentioned, which was acknowledged before a notary public of Cook county, in the State of Illinois. There was also attached thereto an assignment of the said judgment in favor of Nichols made by the said Nichols to Louis A. Groff as attorney in fact, which assignment was to the said A. W. Rhodes, and which was also acknowledged before a notary public in and for Los Angeles county. The next paper presented in the redemption proceedings was an affidavit of A. W. Rhodes to the effect that he had in his possession the original power of attorney from Nichols to Groff, and the original assignment of judgment from Nichols to Rhodes, that he had compared them with the original power of attorney and assignment of judgment, and that the foregoing

177 power was a true and correct copy of the original, and the assignment was a true and correct copy of the original assignment of judgment made by Nichols to Rhodes, which assignment was made on the 7th day of December, 1898.

Then followed another affidavit by Rhodes to the effect that he was the holder of the assignment for Nichols, and the judgment in favor of Nichols against Anna P. Spencer, for the sum of $1015.30, and costs, made and entered September 30, 1897, in the superior court of Los Angeles county, State of California. That no part of said judgment had been paid, and there was then actually due and unpaid thereon the sum of $1100. With the said papers was also a copy of the docket certified to by the clerk of the court.

The copy account from Shepherd's book of his account against Mrs. Spencer showed that on June 10th, 1897, she was indebted to him $2793; and also showed advances by Shepherd to her after that date and up to Dec. 9th, 1898, the further sum of $2074.66, making the total indebtedness of Mrs. Spencer to Shepherd the sum of $4867.66.

The sheriff's certificate issued to Rhodes was also introduced in evidence and bore date the 13th day of December, 1898, and was acknowledged on that day. It was in the usual form to the effect that on the 13th day of December, 1898, A. W. Rhodes, the assignee of this Nichols judgment, did in due form of law, tender and pay to me the sum of $10070, in full payment of the purchase price paid by John D. Hooker at the sale of the real property made by
178 John Burr, sheriff, on June 13, 1898, under the decree of foreclosure and order of sale issued upon the Bishop judgment hereinbefore referred to. A certificate that he received the said sum of money so tendered and paid as aforesaid, for said John D. Hooker, said purchaser, and have granted and executed to the said A. W. Rhodes this certificate of redemption of said property in conformity with the statute in such cases made and provided.

Then followed a description of the property, and the certificate was regular and sufficient in form, and no question is made as to the form of the certificate, and no question is made as to any of the redemption papers save only the sufficiency of amount, and that payment was made by check, and Mrs. Spencer had no title when judgment was docketed.

The certificate of the Guarantee & Trust Company as to the liens upon the property showed substantially the following facts:

That on the 10th of June, 1897, the property stood in the name of Mrs. Anna P. Spencer, the description of the property being:

First. 94 acres, more or less, situated in section 8, township 2 south, range 13 west, S. B. B. & M., in the city and county of Los Angeles, State of California, conveyed by Harvard Place Land & Water Company, a corporation, to Mrs. Anna P. Spencer, by deed dated October 3, 1889, recorded in Book 605, page 44 of deeds. That this was subject to a mortgage executed by Anna P. Spencer, A. H. Spencer, her husband, to secure a note for $13,000, dated May
179 15, 1893, due five years after date, with interest at 9½ per cent. per annum, payable quarterly, in favor of the State Loan & Trust Company, of Los Angeles, recorded in Book 373, page 149, of mortgages, assigned to Charles R. Bishop, by assignment dated May 12, 1897.

Second. Lot 3 and the southerly 17¾ feet of lot 4 in block 52 of the Huber tract in said city, conveyed by John Liero to Mrs. Anna P. Spencer by deed dated August 30, 1887, recorded in Book 302, page 58 of deeds, subject to a mortgage executed by Mr. and Mrs. Spencer, to secure a note for $5000, dated October 16, 1893, due two years after date, with interest at 11 per cent. per annum, payable semi-annually, in favor of Jacob Swiggart, assigned by him to Charles R. Bishop, being the same note under which the foreclosure sale was had of the property in controversy here.

Third. Lot 2 in block 27 of the Huber tract, conveyed by Elizabeth N. Tuttle, a widow, and Mrs. C. M. Flanders, a widow, to Mrs. Anna P. Spencer, by deed dated September 17, 1887, subject to a mortgage by Spencer and wife to secure a note for $2000 dated October 9, 1894, due one year after date, interest 9 per cent. per annum, payable

quarterly in favor of S. Bodrero, assigned to Charles R. Shepherd May 26, 1897.

Fourth. The east 110 feet of the north 34 feet of lot 4 in block 17 of Ord's survey in said city of Los Angeles, conveyed by Victor Lelong to Mrs. Anna P. Spencer, deed dated December 29, 1887, subject to a mortgage executed by Anna P. Spencer, a widow, to
180 the Main Street Savings Bank & Trust Company, to secure a note for $10,000 dated December 4, 1895, due one year after date, interest at 10 per cent. per annum, payable quarterly.

Fifth. A portion of block 23, of Ord's survey, fronting 42 feet on the easterly line of Spring street and 152 feet in depth, conveyed to Mrs. Anna P. Spencer by deeds from J. D. Platt and others, including her husband, dated September 30, 1887, and April 2, 1888. This property was subject to the same mortgage last described to the Main Street Savings Bank & Trust Company.

Sixth. Block F, of the Freer tract in the county of Los Angeles, conveyed by John F. Turner and Charles E. Day to Mrs. Anna P. Spencer by deed dated March 31, 1890.

Seventh. Lot 86 of Goldworthy & Chroni's subdivision of the Clement tract in the city of Los Angeles, conveyed to Mrs. Spencer, October 26, 1893.

The tax statements hereinbefore referred to, are the tax statements made by Charles J. Shepherd of his property to the county tax assessor, and to the city assessor, for the years 1898 and 1899.

These statements show that Charles J. Shepherd returned for taxes, both for city and county, a large amount of property, in the years 1898 and 1899, and none of the property included in the deed from Mrs. Spencer to Dickey was included in either of the said tax statements. Said tax statements were respectively verified by the oath and affidavit of Charles J. Shepherd, in which affidavits he states
181 that the property included in said statements of 1898 were sworn to in April, 1898, and the statements of 1899 were sworn to about April, 1899.

The tax books for 1897 and 1898 referred to as being introduced in evidence showed that for the city and county taxes in the year 1897, Shepherd did not pay taxes on any of the property included in the deed from Mrs. Spencer to Dickey, but suffered all said property, both for city and county taxes, to go delinquent and to sale. And that he did pay on his property which he had given in for taxes and did not suffer it to go delinquent.

Also for 1898 the tax books both for city and county show the same conditions as above stated in reference to said property. Shepherd paid both city and county taxes on the property included in his tax statements but paid none of the taxes on any of the Spencer property for 1898.

The cause was then continued until November 16, 1899.

The certificate of the Guaranty & Trust Company hereinbefore referred to, showing the incumbrances on the property included in the deed from Anna P. Spencer to O. E. Dickey, dated June 10, 1897, at the date of said deed, was then admitted in evidence, and it was admitted that the ranch where the witness McCaslin lived, was the

El Monte ranch, and included in the same deal; that Shepherd paid no consideration for the deed from Mrs. Spencer other than as testified by Judge Lamme.

It was agreed that Judge Lamme, who had been witness
182 in the case, should be recalled by defendants, and he testified as follows: that upon the lot upon Broadway, the subject of the controversy here, there were two houses; that Mrs. Spencer occupied the house on the north side at the time of the deed to Dickey, and continued so to do until she surrendered possession to Rhodes.

And the house on the south side of the lot was in possession of a tenant of Mrs. Spencer's at the date of the deed, and the said tenant continued to occupy it and pay rent to her.

The defense also offered in evidence the deed from Anna P. Spencer to Charles J. Shepherd, being the same deed testified to by E. W. Lamme in the oral testimony, and referred to as the confirmatory deed, it was also admitted that the records would show that the action of Thomas Mulligan against Anna P. Spencer was pending in court August 12, 1897.

The cause was then continued to January 24, 1900, and upon leave of the court, the complaint had been amended and the amended complaint was filed on November 20, 1899, and the counsel for the plaintiff here stipulated, but without waiving the objection that the fact was irrelevant, and immaterial in the case, that the First national bank was a solvent bank in this city, and that Mr. Hooker is a director in the First National Bank of Los Angeles.

J. A. MURIETTA, recalled, testified as follows:

Witness produced the redemption papers. They were all
183 dated the 12th day of December, 1898. The witness was asked the following question by Mr. Chapman:

Q. Can you tell me when this redemption was attempted to be made?

A. I believe it is stated here, on the 13th of December.

Q. When was that date put on there?

A. This is the date that I received it here. I put that date on the same date that I have it. That is my writing. (Referring to the date on the redemption notice.) I put that on there at the time the paper was delivered to me. I don't know what day they were recorded.

By Mr. CHAPMAN:

Q. Now, Mr. Murietta, was that check certified when it was delivered to you?

A. Well, now, I have thought that matter over, after you had talked with me (addressing himself to Mr. Chapman): I thought that matter over, and there has been so many checks passing through my hands, I really don't know at the date it was delivered whether it was certified or not. I don't know whether I went myself to the bank to certify it, or whether it was already certified. I am not

clear in my mind. There is so many checks put in my hands in these cases, I can't remember.

Q. You remember that you did tell me that the check was delivered to you uncertified, and that you took it yourself the next day, and had it certified?

A. Yes, sir, I did tell you, but I am not clear in my mind.

184 The COURT: Then it is stipulated that this redemption was effected by the delivery of a check upon the First National Bank of Los Angeles, California, drawn by Clark & Bryan, certified by the cashier of the said bank to be good?

Mr. CHAPMAN: Well, that word "effected"——

The COURT: Well, attempted to be effected. Any word that you please, and that so certified the check was delivered to the sheriff, who took and accepted the same for the amount therein expressed in the check, and issued a sheriff's certificate of redemption, all of which occurred on the 13th of December, 1898, and upon the said date, the certificate of redemption so issued was duly recorded in the recorder's office of Los Angeles county?

A. It was admitted that the check was duly certified by tbe First National Bank.

The COURT: It does not make any difference. Under the law, it became then charged up to the account and paid as far as the bank was concerned.

Mr. CHAPMAN: The check was not paid until after we filed this amended complaint.

The COURT: But as a legal proposition, they were required to charge up the money to Clark & Bryan.

Mr. CHAPMAN: Undoubtedly. When they certified that check, the bank was bound to pay it.

Mr. CHAPMAN: I think about November 25th or 26th of 1899, the check was actually paid. The sheriff took the check to the bank on the 25th or 26th of November, 1899, and did cash it.

It was agreed that the check was cashed the 25th or 26th of November, 1899.

185 WESLEY CLARK was then recalled on behalf of the plaintiff, and testified as follows:

By Mr. BOWER:

Q. Do you remember the circumstances of the redemption of this property involved in this suit?

A. Yes, sir. On the 12th of December, Mr. Anderson and Mr. Rhodes and myself attempted to redeem from Mr. Hooker direct.

The COURT: In so far as it relates to the check, only, it is admissible.

Mr. BOWER: That is all we are after.

By Mr. BOWER:

Q. I will ask you, Mr. Clark, to state whether or not you made any offer to the sheriff of the gold coin on the 13th, at the time you made this redemption.

The counsel for the plaintiff objected on the ground that it was irrelevant and immaterial.

The court overruled the objection and the plaintiff excepted.

A. On the afternoon of the 12th of December, 1898, I sent our typewriter down to the First National Bank with a check for $10,500; told her to take the buggy and go down there and bring the money to the office—actual gold coin. She did so, and I put it in the safe, and about six o'clock that afternoon, I put the same money in my buggy, with Mr. Anderson and Mr. Rhodes, and made an attempt to redeem directly from Mr. Hooker at his residence. That was the
12th. Failing to find him, the money was brought back
186 and delivered to me. I waited in the office for the buggy, and
I took the money, $10,500 in gold. We had our papers then all ready in the evening, failing to redeem directly from Mr. Hooker, to redeem the next morning from the sheriff. That was the morning of the 13th of December; because the question arose there whether or not the sixth months expired midday or midnight, and we wanted to take no chances on it. I told Mr. Anderson not to take any chances on it, and make our demand before midday, so there would be no question about midday or midnight. And so I went up to the sheriff's office somewhere between eight and ten o'clock, and told Mr. Murietta that we had filed a notice with the recorder to redeem the day previous from Mr. Hooker, but failing to do that, we were going to redeem that morning from him, or through the sheriff's office, and that we had the actual gold coin we could bring up there; and Mr. Murietta said, "Bring me a certified check; we would rather have that." So I took that $10,500 and placed it back in the First national bank, and took the certified check. The check I had in my pocket from the afternoon before. I drew the check myself the 12th of December, and used it in the morning of the 13th of December; had Mr. Hammond certify it, personally, myself; and took it up to the sheriff's office and used the check, and had the actual money in my possession, either the check or the money. I had them both the afternoon of the 12th. I drew one check for $10,500, presuming Mr. Hooker might in the meantime—the actual amount to redeem was
$10,070—presuming there might be some taxes and some-
187 thing, so I put in there $430 excess, and told Mr. Rhodes
there was $10,500 in the sack, in the two sacks. And also drew another check, in the event we could get around to the sheriff that afternoon of the 12th—Mr. Rhodes reported having an engagement with Mr. Hooker at his office at two o'clock—in the event we could get around that afternoon if he failed to redeem of Mr. Hooker, I also drew another check payable to the sheriff for $10,070. And failing to find Mr. Hooker and putting it off until that night

and failing to find him, I took the same check that next morning, that bore the date of the 12th of December, and had it certified to on the 13th, and in pursuance of Mr. Murietta's expressed preference for a certified check, I took that up instead of the money. I had $10,500 gold coin—I had $430.00 excess. I thought I would put in some three or four hundred dollars, and just drew a check for $10,500. Incorporated in this certified check was $10,070. just the amount of interest from June 13, 1898, to December 13, 1898, one per cent. a month; $9500, with one per cent., made $10,070. That was the exact amount I took up as necessary to redeem from the sheriff. I could have just as easily taken the thirty or thirty-five pounds of gold up to Mr. Murietta, if he had not expressed a preference to the contrary, said he always preferred a certified check. I was acting with and for Mr. Rhodes in making that redemption, at the time I had this conversation.

188 Mr. Clark was then asked by the counsel for the plaintiff to take the stand again, and counsel put to him the following question:

Q. You say you took the money back to the bank on the morning of the 13th?

A. No, sir, I said I had it deposited the morning of the 13th.

Q. Didn't you take it back on the evening before?

A. Yes, sir, I took it back there, but didn't place it to our credit. Just put it in the drawer there during the night. Mr. Anderson and Mr. Rhodes got back to our office I suppose about seven o'clock.

Q. You went back after you went to Mr. Hooker, and didn't find him, you went and took the money back to the bank, didn't you on the evening of the 12th?

A. In the evening, yes sir.

Q. And left it there?

A. And I telephoned Mr. Gibson; I telephoned Frank Gibson that I had $10,500. in the office down there and I would feel a little more comfortable if it was down in the bank, would he come down there and take it if I would bring it down; and he said he would. So after dinner I went back to my office and took the money down to the bank; and Frank Gibson said, "Well, Mr. Clark, it will be just as safe in here, and I will just put it in the drawer here somewhere and I can put it to your credit tomorrow morning," and so next morning I went down and put it to our credit in the bank.

Q. Didn't he put it in the safe?

189 A. No, he said it was a time lock, and didn't put it in the safe.

Q. You didn't take it out of the bank any more after that?

A. No, I had used it all I expected to use it; I had it on the night of the 12th, and it went to my credit on the morning of the 13th.

This closed the testimony.

Mr. BOWER stated: We better just consider, so far as the answer is concerned, that those denials will be made to the amended complaint that are——

Mr. ANDERSON: It was stipulated, I believe, before.

Mr. BOWER: We will put the matter in proper shape, though, so that the record may go up properly, if the matter should go any further than your honor's decision.

Subsequently the case was submitted to the court on the testimony taken and the stipulation of the parties and the records in the cause, and briefs filed.

On the 29th day of March, 1900, the court delivered an opinion in the cause, which was filed in the court, and ordering a judgment in favor of the defendants; and afterwards, to wit, on the 10th day of April, 1900, the counsel for the defendants served upon the plaintiff an amended answer, and on the 11th day of April, 1900, the amended answer was filed in the clerk's office, and on the afternoon of the same day, the judge signed the findings in the cause and judgment, and they were filed therein, and plaintiff had made no offer and had taken no steps and had no desire to offer any further testimony.

190 No evidence of any kind was introduced after the service and filing of the said amended answer, nor after the conclusion of the evidence as hereinbefore given. Neither the plaintiff nor his counsel was present when the findings were delivered to the judge, in the cause, or the judgment therein rendered. But plaintiff's attorney was notified on April 10th, when amended answer and rulings were served upon him that the findings were drafted and would be presented to the court to sign the next day. There was no evidence of any offer to pay any greater sum of money than the $10,070, introduced in the cause at all, nor was any such offer made in any other way than by pleading it in this amended answer, served and filed several days after the court's decision had been announced.

Some rulings as to the admissibility of testimony were reserved by the court during the course of the trial, and on the 10th day of April, 1900, the court made its rulings in writing on all reserved questions, and a copy thereof was on that day served on attorney for plaintiff—the following being a correct copy thereof:

191 In the Superior Court of Los Angeles County, State of California.

JOHN D. HOOKER, Plaintiff,
vs.
JOHN BURR ET AL., Defendants.

During the progress of the trial of the above entitled action the court reserved its rulings as to the admissibility of certain testimony objected to by the respective parties, and it was stipulated that such rulings might be reserved by the court and passed upon with the case.

The court now makes its ruling on the objections made, as follows, to-wit:—

1st. The objection of plaintiff's attorney (page 28 Transcript of Evidence) to the testimony of witness Bonner as to conversations by him with Shepherd, Dickey and Lamme, occurring after 10th June, 1897, is sustained, and said evidence is stricken out,—except as to so much of said evidence as was introduced by the plaintiff.

2nd. The objection of plaintiff's attorney to the evidence of McCaslin (on page 49 Transcript of Evidence) as to whom he paid rent for the El Monte ranch, is over-ruled.

3rd. The objection of plaintiff's attorney to question,—"Did you ever have any notice of any change of ownership in the property up to the time that Mr. Moss notified you that he had ac-
192 quired the property, along about February or March of this year?" (in McCaslin's testimony, page 50 Transcript of Evidence) is over-ruled.

4th. The objection of plaintiff's attorney to testimony of witness Hanscroft (page 52 Transcript of Evidence) is over-ruled.

5th. The objection of plaintiff's attorney to proof of value of the properties by witness Burbank (page 57 Transcript of Evidence) is over-ruled.

6th. The evidence of witness Burbank as to negotiations with Lamme and Mrs. Spencer, (found on pages 54–55–56 Transcript of Evidence) is stricken out as coming under the objection of plaintiff on page 28 Transcript of Evidence.

7th. The testimony of witness Baker (found on pp. 67, 68, 69–70 Transcript of Evidence) as to negotiations with Lamme and Mrs. Spencer is stricken out as coming under the objection of plaintiff on page 28, Transcript of Evidence.

8th. The objection of plaintiff's attorney to the statement from Shepherd's books; showing Mrs. Spencer's indebtedness to Shepherd (on page 75 Transcript of Evidence) is overruled,—it being stipulated that the objection so far as it being a copy or statement from the book, was waived.

9th. Objection of plaintiff's attorney to the testimony of Judge Lamme (page 80 Transcript of Evidence) is overruled.

10th. The objection of plaintiff's attorney to the tax statement, &c., offered by defendant (page 104 Transcript of Evidence) is over-ruled.

193 11th. The objection of defendants to the Shepherd redemption papers offered by plaintiff (page 115 Transcript of Evidence) is sustained.

12th. The objection of defendants to deposition, complaint and answer, in action No. 31371 (page 117 Transcript of Evidence) offered by plaintiff, is sustained.

13th. The receipt offered by defendants (page 120 Transcript of Evidence) is the copy of the paper contained in the Variel statement, which was stipulated by both parties to be placed in evidence; and the objection to it is over-ruled.

14th. The objection of plaintiff's attorney to the evidence of defendants that the plaintiff is a director of the First national bank, is sustained on the ground that it is immaterial, (see Transcript of Evi-

dence, page 127); and the objection to the evidence that said bank is a solvent bank is over-ruled (see page 127 Transcript of Evidence).

15th. Plaintiff's objection to the offer of defendant- to prove the custom of the sheriff's office as to receiving payment on redemptions; and as to the custom of said bank as to paying checks in coin (pages 128 & 129 Transcript of Evidence) is sustained.

So that there will be no misunderstanding as to the ruling, the court would state, in a general way, that all testimony of Bonner, Burbank and Baker as to conversations with Shepherd or Mrs. Spencer and Lamme, and as to declarations of Shepherd and Mrs. Spencer, objected to by plaintiff's attorney, is stricken out.

M. T. ALLEN,
Judge Superior Court.

April 10th 1900.

194 None of the testimony of witnesses Bonner, Burbank and Baker as to conversations between them or either of them, and Mrs. Spencer, Shepherd or Lamme occurring after the 10th day of June, 1897, and as to declarations of Shepherd and Mrs. Spencer after that date, was considered by the court in deciding said cause; and all of said testimony was stricken out by the court under the objection of plaintiff's attorney; and said testimony is not properly a part of the record, but is suffered to remain in the statement at the request of plaintiff's attorney.

The plaintiff was not present in person or by his attorney when the above rulings were made, or said order was signed and filed, and to each of the said rulings against the plaintiff, the plaintiff then and there duly excepted.

The plaintiff now specifies the following errors of law committed at the trial and excepted to by the plaintiff, and upon which the plaintiff will rely on his motion for a new trial.

I.

The court erred in the first of the rulings contained in the said written order passing upon the reserved questions of evidence in excepting from the order sustaining the objections to the testimony of witness Bonner, or so much of said evidence as was introduced by the plaintiff; and in the ruling at the concluding part thereof to the effect that in order that there should be no misunderstanding as to the rulings of the court, the court would state in a general way that

195 all testimony of Bonner, Burbank and Baker as to conversations with Shepherd or Mrs. Spencer or Lamme, and as to declarations of Shepherd or Mrs. Spencer, objected to by plaintiff's attorney, is stricken out, in this that the said ruling leaves it uncertain as to what, if any portion of the testimony of said witnesses concerning said conversation, the court permitted to remain as a part of the evidence upon which he acted, because there was no evidence of either of these witnesses introduced by the plaintiff, except in cross-examination, or in connection therewith; and secondly, all of such conversations and declarations were objected to by plaintiff's attorney not specifically, but the whole evidence of that char-

acter went in under the objections of the plaintiff, and should have been all stricken out, and it is impossible to determine what was left.

II.

The court erred in overruling the objection of the plaintiff to the evidence of McCaslin as to who he paid rent to for the El Monte ranch.

III.

The court erred in overruling the objection of the plaintiff's attorney to the question put to the witness McCaslin: "Did you ever have any notice of any change of ownership in the property up to the time that Mr. Moss notified you that he had acquired the property along about February or March of this year?"

IV.

The court erred in overruling the objection of the plaintiff to the testimony of the witness Huscroft as to the payment of rents to Mrs. Spencer between June 10, 1897, and December, 1897.

196

V.

The court erred in overruling plaintiff's objection to the statement from Shepherd's book, purporting to show Mrs. Spencer's indebtedness to Shepherd.

VI.

The court erred in overruling the objection of the plaintiff to the tax statements filed by the defendants, given in by Charles J. Shepherd in 1898, for State and county taxes, and also of the State and county taxes for 1899, and the city taxes for 1898.

VII.

The court erred in sustaining the objection of the defendants to the deposition and the complaint and answer in action No. 31,371.

VIII.

The court erred in overruling the objection of the plaintiff to proof of value of the properties by the witness Burbank, and any evidence of the value.

The plaintiff now specifies the following particulars wherein the evidence is insufficient to justify the findings, to wit:

I.

The evidence is insufficient to justify the finding that the judgment of E. R. Nichols against Anna P. Spencer was duly given and made, or that it was entered with authority, or that it was duly docketed.

II.

The evidence is insufficient to justify the second finding that upon the docketing of the said judgment of E. R. Nichols against
197 Anna P. Spencer, October 1st, 1897, said judgment became a lien upon the real estate described in the complaint in the action, or that such judgment ever became a lien upon the said real estate.

III.

The evidence is insufficient to justify the finding that on the 10th day of June, 1897, Anna P. Spencer, owed to Charles J. Shepherd about twenty-five hundred dollars, and that said relation of debtor and creditor continued after the 10th day of June, 1897, or any time after the deed from Anna P. Spencer to Orange E. Dickey.

IV.

The evidence is insufficient to justify the finding that the deeds from Anna P. Spencer to Orange E. Dickey and from Orange E. Dickey to Charles J. Shepherd of date June 10, 1897, were executed, or that either of them was executed, for the purpose of or intended as security to Charles J. Shepherd for the debt of Anna P. Spencer then owed him, and future advances to be made by him to her, and on her account; and the evidence is insufficient to justify the finding that the said deeds, or either of them, were made for the purpose or were intended as security for the payment of any sum of money, either then or thereafter to be advanced or loaned, or any debt whatever; and the evidence is insufficient to justify the finding that the said deed from Anna P. Spencer to Orange E. Dickey, and the deed from Dickey to Shepherd did not divest Anna P. Spencer of the title to said property; or the finding that
198 Anna P. Spencer owned any interest in the property on the first day of October, 1897, or at any time thereafter.

V.

The evidence is insufficient to justify the finding that A. W. Rhodes was, on the 13th day of December, 1898, a redemptioner of the property described in the complaint from the sale made to the plaintiff, or that he ever was at any time such redemptioner, or that he did on that day or at any time redeem the said property from said sale.

VI.

The evidence is insufficient to justify the finding that on the 13th of December, 1898, or at any time, A. W. Rhodes offered the sheriff $10,070 in gold coin of the United States, in payment of the redemption of said property, or that he ever offered any gold coin or any amount of money to the sheriff for the redemption of the said property, either the amount of $10,070 or any other amount.

VII.

The evidence is insufficient to justify the finding that the check delivered by A. W. Rhodes to the sheriff in making said redemption has been paid or that A. W. Rhodes ever delivered any check to the sheriff, or that any payment of any check delivered or purporting to be delivered to the sheriff on account of such redemption was ever made, until more than eleven months after the said pretended redemption.

VIII.

The evidence is insufficient to justify the finding contained
199 in paragraph VIII of the findings that the amount of the said check, or any payment made to the sheriff, for such redemption, to-wit: $10,070 was sufficient to effect any redemption; and the evidence is insufficient to justify the finding contained in the said paragraph VIII of the findings that the said deed was not invalid.

IX.

The evidence is insufficient to justify the finding that the plaintiff was not damaged by reason of the sheriff making said conveyance to A. W. Rhodes.

X.

The evidence is insufficient to justify the finding that the defendant Rhodes was a redemptioner at the time said pretended redemption was made, in that the judgment upon which he pretended to redeem was a judgment by default; that no entry was made upon the said complaint; that the default of the defendant in not answering had been entered, and there was no authority for making up the judgment roll or docketing the said judgment until such entry was made; and furthermore that at the time of the said pretended redemption, the said Anna P. Spencer owned no interest in the property, and at the time of the docketing of the said judgment, to-wit: on the first day of October, 1897, she had no interest therein, and had parted with her interest more than six months before that time.

XI.

The evidence is insufficient to justify the findings or any finding that the proceedings taken by the said A. W. Rhodes were
200 sufficient to have effected a redemption, if he had been a redemptioner, and there had been a lien upon the said property by reason of the docketing of the said judgment, and because no money was paid by the said A. W. Rhodes nor any check delivered by the said A. W. Rhodes, and because the said check was not a payment to the sheriff under the provisions of the statute, and was not the check of the pretended redemptioner, nor any agent of the said redemptioner, and the said check was not cashed at the time of said pretended redemption, nor on the day, not until more than eleven months thereafter; but remained in a drawer in the sheriff's office

for the said period of more than eleven months, and there is no evidence proving or tending to prove that it ever was paid out of any funds of the drawers of the check, or of the said pretended redemptioner in the said bank at the time of said pretended redemption; and furthermore the amount of such check, to-wit: the said sum of $10,070 was insufficient to effect a redemption if it had been tendered or paid to the sheriff in gold coin.

And further that the sheriff of the county of Los Angeles had no authority to accept the said check, and no authority to accept any sum of money from the said A. W. Rhodes, or any agent of his, and the case was not one in which any redemption could be made by payment to the sheriff at all.

And now the plaintiff asks that the foregoing statement on motion for new trial be settled and allowed, and certified as correct, and that a new trial be granted herein.

J. S. CHAPMAN,
Attorney for Plaintiff.

201 We certify that the foregoing engrossed statement is O K, and consent that it may be settled and certified as correct.

(Signed) J. S. CHAPMAN, *Attorney for Pl'ff.*
ANDERSON & ANDERSON AND
E. C. BOWER, *Att'ys for Def'ts.*

I hereby certify that the foregoing is a correct statement on motion for new trial, and the same is hereby settled and allowed this 19th day of September, 1900.

M. T. ALLEN, *Judge.*

Sept. 19, 1900.

Endorsed: Filed Sep. 19, 1900. C. W. Bell, clerk. By W. L. Warren, deputy.

Order denying motion for new trial entered in minutes of court, September 19, 1900, and filed with the clerk on the same day, as follows:

(Title of Court and Cause.)

The statement on the plaintiff's motion for a new trial having been duly settled and certified, and the parties being now present in court by their respective attorneys, and the motion for a new trial coming on regularly to be heard by the consent of the respective parties, and having been duly submitted to the court,

It is now ordered by the court that the motion of the plaintiff for a new trial in this cause be and the same is hereby denied.

M. T. ALLEN, *Judge.*

Sept. 19, 1900.

Endorsed: Filed Sep. 19, 1900. C. W. Bell, clerk. By W. L. Warren, deputy.

202 (Title of Court and Cause.)

Notice of Appeal from Order Denying New Trial.

To the defendants and their attorneys:

Notice is hereby given that the plaintiff in the above entitled action hereby appeals to the supreme court of the State of California, from the order denying the plaintiff's motion for a new trial of this case, made, filed, and entered in the minutes of said court upon the 19th day of September, 1900, and from the whole of said order.

J. S. CHAPMAN,
Attorney for Plaintiff.

Endorsed: Filed Sep. 22, 1900. C. W. Bell, clerk. By J. O. Lowe, deputy.

Received copy of the within notice this 22nd day of Sept., 1900.

ANDERSON & ANDERSON,
E. C. BOWERS,
(Per E. C. B.,) *Attorneys for Defendants.*

Clerk's Certificate to Transcript.

(Title of Court and Cause.)

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I, C. W. Bell, county clerk of the county of Los Angeles, and *ex-officio* clerk of the superior court in and for said county, hereby certify that I have compared the foregoing transcript of the
203 original papers in the above entitled action, now on file in my office, and with all orders therein made and entered on the minutes of said court, and that said transcript contains full, true and correct copies of said original records upon both the appeal from the judgment in said case and from the order denying plaintiff's motion for a new trial, consisting of the judgment roll, statement on motion for a new trial, motion for a new trial, order denying motion for a new trial and two notices of appeal.

I further certify that undertakings on appeal, both from the judgment and said order denying plaintiff's motion for a new trial, in due form, have been properly filed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this — day of September, 1900.

C. W. BELL, *Clerk,*
By —— ——, *Deputy.*

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated and agreed by and between the respective counsel for plaintiff and defendants in the above entitled action, that the foregoing is a full, true and correct transcript of the records on the appeals from the judgment in this cause, and from the order of the said superior court denying the plaintiff's motion for a new trial, and that the same contains a full, true and correct copy of the judgment roll in said action, and of the statement on motion for a new trial, the order denying a new trial and of the notices
204 of appeal herein, and proof of the service thereof, and that the said appeals from the said judgment and from said order denying plaintiff's motion for a new trial, may be taken, heard and determined on the foregoing transcript.

And it is further stipulated that undertakings on the appeals, both from the judgment herein and from the said order denying plaintiff's motion for a new trial, in due form have been properly filed.

Dated Oct. 25, 1900.

J. S. CHAPMAN,
Attorney for Plaintiff and Appellant.
E. C. BOWER &
ANDERSON & ANDERSON,
Attorneys for Defendants and Respondents.

205 Received copy of the within for the judge who tried the case, this 26 day of Oct., 1900.

C. W. BELL, *Co. Clerk,*
By C. G. KEYES, *Deputy.*

Service accepted by copy this 25 day of Oct., 1900.

E. C. BOWER,
ANDERSON & ANDERSON,
Attorney- for Defendants.

206 In the Supreme Court of the State of California, Department Two.

APRIL 21, 1902.

Present: Hon. McFarland J. presiding. Temple J. Henshaw J. Boody deputy clerk Poole bailiff.

Cause argued by J. S. Chapman for appellant, E. C. Bower for respondent and by J. S. Chapman in reply and submitted.

Copy of minute order April 21 1902.

207 JOHN D. HOOKER, Plaintiff and Appellant, *v.* JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants and Respondents. } L. A., No. 1026—Department Two.

Plaintiff Hooker was the purchaser at foreclosure sale of land which had been mortgaged by the Spencers. Defendant Rhodes, by assignment, had become the owner of a judgment which one Nicholls had recovered against Anna T. Spencer (in whom the legal title to the mortgaged property stood). Nicholls' judgment was docketed in October, 1897. The mortgaged property was sold upon the 13th of June, 1898. Rhodes, as substituted judgment creditor under the Nicholls judgment, claimed his rights as redemptioner and by payment to the sheriff effected a redemption of the mortgaged property in due time receiving the sheriff's deed therefor. Thereafter Hooker commenced this action, making defendants Rhodes and the two sheriffs of Los Angeles county, the one with whom Rhodes' redemption had been effected, the other by whom the deed had been executed.

The facts are not in serious dispute. The controversies between the parties turn rather upon the legal consequences and effects of their admitted acts and transactions. Plaintiff for relief asked the cancelation of the deed made to Rhodes, that Rhodes be restrained from interfering with, or disposing of, the property, and that the sheriff be compelled to make proper conveyance to him. The court found that the mortgagor Spencer at the time of the docketing of the Nicholls judgment retained and had an interest in the property, that Rhodes was a redemptioner and had duly redeemed, and gave judgment in accordance with these findings.

Appellant's contention is that the Nicholls judgment never became a lien upon the property, because upon the 10th of June, 1897, Mrs. Spencer had conveyed all her right, title and interest in and to the property to Orange E. Dickey. Orange E. Dickey upon the same day conveyed the property to Charles J. Shepherd. It is contended by appellant that these deeds were absolute and stripped Mrs. Spencer of the last vestige of title to the property in controversy. The court, however, found that at the date of the execution of the deeds, and thereafter, Mrs. Spencer was indebted to Charles J. Shepherd in the sum of about $2,500, and that the deed to Dickey (proved to have been without consideration excepting such as flowed to his grantee Shepherd) and the deed from Dickey to Shepherd were executed for the purpose of and intended as security to Charles J. Shepherd for the debt which Anna Spencer then owed him, and for future advances contemplated to be made to her and for her account, and that these deeds did not divest Anna Spencer of her title to the property. This finding we think is abundantly supported by the evidence. Mrs. Spencer had become involved, she owed Shepherd, she experienced great difficulty by reason of lawsuits in retaining the property which she then owned, she was in debt and in litigation, and finally, through her attorney, as he testified, "the

scheme was concocted" and carried into effect by which the deeds in question were made. Her attorney thus testified: "The purpose of making the deed was that the property should be put in the name of Mr. Shepherd for the purpose of taking it and securing all the moneys that he had advanced, and if it became necessary for him to mortgage it, to do so, and that there should be no agreement back of it that anybody could dig up and—for the purpose of interfering—we had been handicapped in every way wherever we had gone to arrange for money, we had been told inside of twenty-four hours that somebody had been there making dire threats about what they were going to do with reference to ripping up any arrangements that we had made, because of the fact that Mrs. Spencer was involved."

208 The alternative conclusion is forced, therefore, from this and other like evidence, that the deed was absolutely void as being in fraud of the creditors, or else that it was a legitimate transaction by way of mortgage to secure Shepherd in his pre-existing debt, and in such other advances as he might make in the preservation of Mrs. Spencer's property. The court adopted the latter view, and, without elaborating upon the additional evidence in support of it, it is sufficient to say that the finding is fully sustained.

The effect of this finding is to establish Rhodes' position as a recognized redemptioner, and the remaining questions touch the matter of his redemption. The pertinent facts are the following: About the twelfth day of December, 1898, Rhodes called up Hooker on the telephone and told him that he intended to redeem the Broadway property bought by him, and made an engagement to meet him at his place of business that day at 2 o'clock in the afternoon. Rhodes went to Hooker's place and Hooker failed to meet his engagement. That evening about 6 o'clock Rhodes, accompanied by Mr. Anderson, drove to Hooker's residence, carried with him the notice required by law to make the redemption, and also carried $10,500 in gold coin to pay Hooker the necessary amount to effect the redemption. The servant who answered the bell said that Mr. Hooker was in. Mr. Rhodes and Mr. Anderson requested her to tell Mr. Hooker that they wished to see him. Upon her return she said that Mr. Hooker was not in. They placed the money that night in a drawer of the First national bank for safe keeping, but did not make a deposit of it. The next morning Clark and Rhodes went to the sheriff's office, saw the sheriff, told him that Rhodes was going to make a redemption, stated that Rhodes had the gold coin on hand with which to make the payment, and they would bring up the gold coin from the bank for that purpose. The sheriff responded that he would rather have a certified check than the money, and to bring up a certified check. The $10,500 in gold was then placed in the First national bank and Mr. Clark took out his certified check for $10,070 and delivered it to the sheriff for Rhodes in redemption payment. The sheriff accepted the check, and upon the same day notified Mr. Hooker that he had his money upon the redemption of the property. Hooker declined to accept the money from the sheriff. The sheriff, in fact, had not cashed the check, nor did he cash it until some

eleven months later, after this suit was commenced. The check was then actually cashed and the money upon it received in gold coin. The check could have been cashed for gold coin upon any banking day prior thereto. Mr. Hooker did not know that the redemption had been affected by check until after the commencement of his action, when his pleading was amended to cover this point. He did not, however, believe that the money had been paid in and had, as has been stated, refused to accept it. At the time this mortgage was executed, to make redemption it was necessary to pay the amount of the purchase money, with two per cent. per month up to the time of redemption. In 1897 the code provision was changed, and it now requires from the redemptioner the purchase money with one per cent. per month from the date of the sale. (C. C. P., 209 section 702.) It is admitted that the amount actually paid, $10,070, was the amount of the purchase money with one per cent. per month added.

Upon these facts various propositions are advanced and argued.

1. That the check was the check of Clark, and that Clark was admittedly not a redemptioner, and that, therefore, there was no redemption. But Clark, it affirmatively appears, was acting as the agent of Rhodes and had declared himself to be so acting, and when the sheriff accepted the check he accepted it on behalf of Rhodes, and for the purpose of effecting the Rhodes redemption. If under all the circumstances of the case, which are to be considered hereinafter, the reception of this check amounted to payment, in proper amount and of proper money, appellant may not here be heard to complain that the check was not actually the check of Rhodes.

2. The same may be said of the further objection, that the judgment called for satisfaction in gold coin of the United States, and that the check was not in terms made payable in gold coin. But the check, in fact, was paid with gold coin, and if in other respects the transaction was regular, appellant has received precisely what the law entitled him to receive and has not been injured.

3. It is said that the tender and acceptance of the check constituted no payment whatsoever. Herein reliance is placed upon the case of *Thorne v. San Francisco*, 4 Cal. 127, where redemption was effected by the mayor of San Francisco, acting on behalf of the city, by giving to the sheriff his personal certified check. The check was received and the next day was cashed. Upon this it was said: "Such pretended payment was made by delivering private checks of such individuals to the sheriff. This was no payment under our laws. The constitution forbids it. This is emphatically a hard money State." But Thorne *v.* San Francisco was decided by a divided court, and since then has been distinctly overruled upon other matters and upon this particular question has never been followed. The later doctrine and rule of decisions in cases such as this, as will be seen from the authorities hereinafter cited, is exactly the opposite.

The sheriff is made the agent of the purchaser for the purpose of receiving payment. It is true that his agency is a limited agency,

and that his act does not bind the purchaser upon any matters outside of the payment, and only upon those when, in compliance with the law, payment in money sufficient in amount and kind has been made. In general mercantile and commercial transactions a check after all is but a convenient form of transferring money, and operates either as payment absolute or payment conditional, as the parties themselves intend. (*Sav. and L. Society v. Burnett*, 106 Cal. 514; *Comptoir, etc. v. Dresbach*, 78 Cal. 15.) But in all such transactions where a check is received as conditional payment the payment becomes absolute and relates to the date of the delivery of the check when its recipient actually cashes it. There is, of course, a broad distinction between tender and absolute or conditional payment. The redemptioner might tender anything he chose by way of payment to the purchaser, and the purchaser might accept the money or article tendered, or the purchaser might waive any and every objection to the tender—its time, amount, nature—and if he
210 did so the tender, however inadequate in fact, would thus become sufficient in law. Upon the other hand, the purchaser might reject a tendered check, simple or certified, and his rejection would be valid, because a tender made by check is not legal and cannot, therefore, be enforced. The position of the sheriff, acting under his limited agency, is, however, markedly different. He is the agent merely for the purpose of receiving payment, and that payment, to bind his principal, must be made in the amount and kind of money to which the principal is entitled. He, too, of course, could refuse the tender of a check, but if in a *bona fide* transaction he accepts a check as conditional payment, and that check is regularly paid, his principal has suffered no detriment and the transaction under modern business methods has come to be regarded as perfectly legitimate, and quite within the scope of the agent's authority. Thus in *Jessup v. Carey*, 61 Ind., 584, Walton gave his check for the amount of redemption to the clerk who was authorized by statute to receive money upon redemption. The clerk deposited the check, and the contention was made there as here that the check was not payment and that there had been no redemption. But the court said: "It was not an improper nor an illegal mode of payment for the appellant, Walton, gave his check on a bank in this State for the amount of the redemption money to the clerk of the court, who was willing to receive the check as so much money. If the appellant, Walton, had the money to his credit in bank subject to his check, and the clerk of the court was willing to and did receive his check as so much money. The transaction was fully sanctioned by the ordinary usages of business and was certainly not an illegal payment, if it culminated in the actual payment of the amount of the check upon presentation therefor." In *Webb v. Watson*, 18 Ia., 537, the fact that the mere presentation of the check does not constitute absolute payment, but is conditional merely, becoming absolute upon the cashing of the check, is pointed out, and it is added: "And if in good faith the defendant pays and the clerk receives the ordinary banker's check, and especially of a banker resident in the place where the business is transacted, upon

which he realizes the money when demanded, though after the expiration of the time, having the same ready to pay to the holder of the certificate promptly and without trouble to him, it seems to us that it would not be difficult upon principle to uphold the redemption, and to hold that the creditor or purchaser was bound to take the money and surrender his claim to the land." In *Carter v. Lewis*, 27 Mich., 241, the syllabus accurately states the opinion and decision of the court in the following language: "While the register of deeds has no authority under the statute to receive anything but money in redemption of a foreclosed mortgage, yet when one desiring to redeem goes to the register prepared to pay the money and offers to pay it, and the register, knowing the amount, but being too busy to count the money, requests him to place the money in a bank and give a check for the amount, and he does so, and the register after the expiration of the time for redemption receives for the check a certificate of deposit in his own name for the amount, it cannot be said that this is not such a payment of the money
211 to the register as operates under the statute to redeem the mortgage." And so likewise the United States circuit court, in *Buford v. Henzier*, 8 Bis., 177, held under similar facts that if the amount necessary to redeem from a sheriff's sale is paid to the proper officer in a bank draft, which is accepted by the officer but not actually collected until after the expiration of the time for redemption, the redemption is nevertheless complete. It is not essential that the payment be made in money unless so required by the officer.

In the case at bar it was wholly for the convenience and at the request of the sheriff that the certified check was substituted for the gold coin which was offered to be paid, and in seasonable time the check was cashed in gold coin and the actual money taken into the custody of the sheriff. The redemption in this respect was certainly sufficient.

4. It is next contended that the redemption was insufficient for the amount; that the law at the time of the making of the mortgage entered into and became a part of the contract; that by that law the redemptioner was required to pay two per cent. per month in addition to the purchase money, while it is an admitted fact in this case that but one per cent. was paid. In brief, it is contended that to permit section 772 of the Code of Civil Procedure as amended in 1879 to operate upon the contract, is to impair its obligation. Herein especial reliance is had upon the case of *Barnitz v. Beverley*, 163 U. S. 118, which is said to be conclusive upon the question. In the earlier case of *Con. M. L. I. Co. v. Cushman*, 108 U. S. 50, that same august tribunal, having under consideration a case identical in principle to the one here in question, wherein the rights of the purchaser were involved, held that a law passed subsequent to the mortgage and reducing the interest to be paid to a purchaser at such sale was operative and did not interfere with the rights of the purchaser whose contract did not exist until the time of the sale, and was governed by the laws in force at such time. Much nice reasoning is indulged in here to show that the principle declared in

the Cushman case has been overruled in the later case upon which appellant relies. But upon that question the Supreme Court of the United States has itself spoken in Barnitz *v.* Beverley, and has said: "The case of *Con. M. L. I. Co. v. Cushman*, 108 U. S. 51, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of the payment, nor affect any remedy which the mortgagee had by existing law for the enforcement of his contract." * * * This determination of the Supreme Court of the United States upon one of its own decisions is, of course, absolutely binding upon this court. The essential distinction seems to be that, if the party complaining of the operation of the law is himself not injured by it, if the obligations of *his* contract are not impaired, he cannot be heard to complain, nor will the law be held as to him to violate any of his rights. It may be added that since the decision in the case of *Tuolumne R. Co. v. Sedgwick*, 15 Cal. 515, where this question first arose in this State, and where the same conclusion was reached and expressed as by the United States in the Cushman case, the rule in this State has always been the contrary of that contended for by appellant.

This concludes a review of the principal points argued upon these appeals. Certain errors of the trial court in the admission and rejection of evidence are also presented. They have been examined, but we do not find that in any of them appellant has suffered injury.

The judgment and order appealed from are, therefore, affirmed.

HENSHAW, *J.*

We concur:

McFARLAND, *J.*

TEMPLE, *J.*

212 In the Supreme Court of the State of California, Dep't Two.

JOHN D. HOOKER, App., *vs.* JOHN BURR ET AL., Resp. } L. A., No. 1026. On Appeal from the Superior Court of the County of Los Angeles.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed November 21 1902, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court, this 3rd day of March, A. D. 1903.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By J. C. CROOKS, *Deputy*.

[Endorsed:] L. A. No. 1026 In the supreme court, State of California. John D. Hooker app. *vs.* John Burr *et al.* resp. Certified copy of opinion. Filed —— —. —— ——, clerk. By —— ——, deputy.

213 In the Supreme Court of the State of California, in Banc.

HOOKER
vs.
BURR ET AL. } L. A., No. 1026.

By the COURT: Rehearing denied. December 20, 1902.

Endorsed: Filed Dec. 22 1902. Geo. W. Root clerk By W. E. Boody deputy.

214 In the Supreme Court of the State of California, Dep't Two.

JOHN D. HOOKER, App., *vs.* JOHN BURR ET AL., Resp. } L. A., No. 1026. On Appeal from the Superior Court in and for the County of Los Angeles.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Henshaw J.

We concur,
McFARLAND, *J.*
TEMPLE, *J.*

J. C. C. Whereupon it is now considered ordered adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles in the above entitled cause, be and the same are hereby affirmed.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 21st day of November, 1902, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 3 day of March, A. D. 1903.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By J. C. CROOKS, *Deputy*.

[Endorsed:] L. A. No. 1026 In the supreme court, State of California. Remittitur. John D. Hooker app. *vs.* John Burr *et al.* resp. Clerk's costs $— Paid by appellant, $12.50 Paid by respondent, $— Total $12.50 Frank C. Jordan clerk. By J. C. Crooks deputy.

215 UNITED STATES OF AMERICA:

JOHN D. HOOKER, Plaintiff and Plaintiff in Error,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants and Defendants in Error.

To the Hon. William H. Beatty, chief justice of the supreme court of the State of California:

The petition of John D. Hooker respectfully shows that on the 16th. day of October, 1893, Anna P. Spencer and Ambrose H. Spencer were the owners of that certain tract of land situated in the city of Los Angeles, county of Los Angeles, State of California, described as lot 3, and the southerly 17½ feet of lot 4, in block 52 of the Huber tract, according to a map of said tract recorded in the office of the county recorder of Los Angeles county in Book 2 at page 280 of miscellaneous records, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and on the said 16th. day of October, 1893, the said Anna P. Spencer and Ambrose H. Spencer made, executed and delivered their promissory note to Jacob Swiggart, for the sum of five thousand dollars ($5,000); which note bore date the said 16th. day of October, 1893, and was payable in gold coin of the United States, and on the same day the said Anna P. and Ambrose H. Spencer executed a mortgage to the said Jacob Swiggart, whereby they mortgaged the said real property in the said city of Los Angeles, and hereinbefore described, to secure the payment of the said promissory note, with interest as in
216 said note provided, and which said mortgage was duly recorded in the office of the county recorder of said
J. C. C. county of Los Angeles; that subsequently to the making of said promissory note and mortgage the said Jacob Swiggart, for good and valuable considerations, assigned the said note and mortgage to Charles R. Bishop, and that prior to the commencement of the suit hereinafter mentioned, Ambrose H. Spencer, one of the makers of the said promissory note, died at the county of Los Angeles, State of California, and Frank M. Kelsey was duly appointed by an order of the superior court of the county of Los Angeles, the administrator of the estate of the said Ambrose H. Spencer, and letters of administration were duly issued to him, and he qualified as such, and was at the time of the commencement of said suit hereinafter mentioned, the duly qualified and acting administrator of said estate, that afterwards, and before the 14th. day of May, 1898, the said note being unpaid, the said Charles R. Bishop still being the owner and holder of said note, commenced suit in the superior court of the county of Los Angeles, State of California, against the said Frank M. Kelsey as administrator of the estate of Ambrose H. Spencer, deceased, and of P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, Isabel Spencer, to recover the amount due upon the said promissory note, and

to foreclose the said mortgage and to obtain a decree for the sale of the said mortgaged premises. And such proceedings were had in the said action; and thereafter, on the 14th. day of May, 1898, a judgment was duly given and made in the said cause whereby it was adjudged and decreed that there was due to the plaintiff in the said action, the said Charles R. Bishop, upon the said promissory note, for principal and interest, the sum of six thousand, seven hundred and eighty-two and 49/100 ($6,782.49) dollars, in gold coin of the United States; and further decreed that the same was a lien upon the said mortgaged property under the said mortgage, and it was also adjudged that the said mortgaged prem-
217 ises should be sold for the payment of the said sum so found to be due.

And thereafter, on the 16th. day of May, 1898, an execution was duly issued out of said court in said cause, directing the sale of the said mortgaged premises for the payment of the said judgment, and which execution was duly delivered to the defendant, John Burr, who was then the duly qualified and acting sheriff of the county of Los Angeles, State of California, and under and by virtue of the said writ of execution, the sheriff sold the said property above described, on the 13th. day of June, 1898, at twelve o'clock m., and at the said sale which was duly made, the plaintiff, John D. Hooker, became the purchaser and paid therefor the sum of nine thousand, five hundred ($9,500) dollars. The said John D. Hooker was the highest bidder for the said property, and the said sum was the highest amount bid, and thereupon the said John Burr, sheriff as aforesaid, executed to the said John D. Hooker, a certificate of sale, and a duplicate thereof was duly recorded in the office of the county recorder of the county of Los Angeles, State of California.

Your petitioner further shows that on the said 16th. day of October, 1893, and at the time the said promissory note was made by the said Anna P. Spencer and Ambrose H. Spencer to Jacob Swiggart, and at the time of the execution of the mortgage to secure the payment of the said promissory note, the statute of the State of California provided that after a sale of real property upon execution upon any judgment rendered in this State, the judgment debtor or redemptioner might redeem the property from the purchaser at any time within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent. per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser might have
218 paid thereon after purchase, and interest on such amount. And that if the purchaser be also a credi*o*tr, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.

And your petitioner further shows that after the execution of the said note and mortgage an act was passed by the legislature of the State of California, amending the said provision with reference to such redemption, and by such amendment it was provided that the judgment debtor or redemptioner may redeem the property from

the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase with one per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And that if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest, and which said amended statute was passed on the 26th. day of February, 1897.

And your petitioner further shows that after the said sale of the said property to your petitioner on the 13th. day of June, 1898, to wit, on the 12th. day of December, 1898, the defendant, A. W. Rhodes, claiming to be a redemptioner of the said property under a judgment against the said Anna P. Spencer, which judgment was docketed on the 1st. day of October, 1898, in the said superior court of the county of Los Angeles, for the purpose of effecting a redemption from the said sale made to your petitioner, paid said John Burr, then sheriff of the county of Los Angeles, State of California, the sum of one thousand and seventy ($1,070) dollars, which sum was paid by a check of date December 12th., 1898, drawn by Clark &
Bryan on the First National Bank of Los Angeles, California,
219 and which said check was not cashed by the said sheriff until
in the month of November, 1899, and the said payment was the only payment made by or on behalf of the said A. W. Rhodes, for the purpose of perfecting the said redemption, and that the sum of ten thousand and seventy ($10,070) dollars, was the amount of the purchase money, together with one per cent. per month thereon as provided in the said amended statute for the redemption of property from sales under executions upon the foreclosure of a mortgage.

And your petitioner further shows that on the 18th. day of February, 1899, the defendant W. A. Hammel, who was then the sheriff of the county of Los Angeles, executed a deed purporting to be a conveyance of the property to the said A. W. Rhodes as such redemptioner from the said sale upon the said payment, and not otherwise; that afterwards your petitioner tendered to the sheriff of the county of Los Angeles the sum of one and 60/100 ($1.60) dollars, claimed by the said Hammel to be the fee for making the deed of conveyance, and demanded of him that he execute to your petitioner a deed of conveyance of the said property which he, the said Hammel, refused; and a similar demand was made upon John Burr, a former sheriff of the county of Los Angeles, and he, the said former sheriff, also refused to make such conveyance, thereupon, on the 14th. day of March, 1899, after the demand by your petitioner for the said deed, your petitioner the said John D. Hooker, commenced a suit in the superior court of the county of Los Angeles, State of California, against the said John Burr, A. W. Rhodes and W. A. Hammel for the purpose of cancelling the deed which had been executed to the said A. W. Rhodes, and to compel the said sheriffs, or one of them, to execute a deed to your petitioner for the said property hereinbefore described, and so sold to him. And that in the complaint in the said action your petitioner set forth the

facts hereinbefore stated, to-wit, the execution of the
220 said note and mortgage by Anna P. Spencer and Ambrose H. Spencer to Jacob Swiggart for the sum of five thousand dollars on the 16th. day of October, 1893; the execution of the mortgage by the said Anna P. Spencer and Ambrose H. Spencer to secure the payment of the said note; the transfer of the said note and mortgage by the said Jacob Swiggart to Charles R. Bishop; the death of the said Ambrose H. Spencer, and the appointment of the said Frank M. Kelsey as the administrator of his estate; and also that a suit had been brought by the said Charles R.
J. C. C. Bishop against the said Frank M. Kelsey, Anna P. Spencer, T. L. Styles, Orange E. Dickey, James Gordon Spencer and Isabel Spencer to recover the amount due upon the said promissory note, for principal and interest and to foreclose such mortgage and obtain a decree for the sale of said mortgaged premises, and that in the said suit such proceedings were had that on the 14th. day of May, 1898, a judgment was duly entered in the said cause, whereby it was adjudged and decreed that there was due to the plaintiff in said action, upon the said promissory note, the sum of six thousand seven hundred and eighty-two dollars and 49/100 dollars in gold coin of the United States, and that the said sum was a lien upon the said mortgaged premises and also a decree that the said mortgaged property should be sold for the payment of the said sum so found to be due, and that on the 16th. day of May, 1898, an execution was duly issued out of said court directing the sale of the said mortgaged premises, and that said execution was duly delivered to the defendant, John Burr, then the duly qualified and acting sheriff of the county of Los Angeles, and that under and by virtue of the said writ of execution said sheriff did duly sell said property on the 13th. day of June, 1898, to your petitioner for the said sum of nine thousand, five hundred dollars, he being the highest bidder, and the said sum being the highest amount bid for the said property, and which said sum was paid
221 by your petitioner to the said John Burr, as alleged in the said complaint, and that thereupon the said sheriff had duly issued to your petitioner a certificate of sale, and had duly recorded a like certificate in the office of the county recorder of the county of Los Angeles, State of California; that the plaintiff was entitled to a deed from the said John Burr conveying the said property so purchased by him on the 13th. day of December, 1898, and that no deed had ever been executed to the plaintiff in the said suit by the said John Burr, or any other person or officer of the county of Los Angeles; that the term of office of Burr expired on the first Monday in January, 1899, and that Hammel succeeded him. And then the plaintiff in said suit, your petitioner, alleged that A. W. Rhodes had delivered to the said John Burr, sheriff of the county of Los Angeles, State of California, on the 12th. day of December, 1898, a check bearing date the said 12th. day of December, 1898, for the sum of ten thousand and seventy dollars, drawn on the First National Bank of Los Angeles by Clark & Bryan, and of which said check a copy was set forth in the said complaint.

And the plaintiff, your petitioner, further averred upon information and belief, that the check was delivered by A. W. Rhodes as and for the payment to the sheriff of the said sum ten thousand and seventy dollars, as and for the redemption of the said property so sold to the plaintiff from the said sale thereof under the said foreclosure agreement; that the said amount of ten thousand and seventy dollars was claimed by the said Rhodes to be the amount so bid by this plaintiff, to-wit, nine thousand five hundred dollars, and interest at the rate of one per cent. per month from the time of said sale, and did at the same time deliver to the sheriff a notice addressed to the plaintiff as such purchaser that he, Rhodes, did redeem the
222 property from said sale, and your petitioner averred that no other or different payment of such amount was ever made by the defendant to the sheriff as or for the redemption of said property, and the plaintiff, your petitioner, averred that the check was no payment to the said sheriff for the plaintiff, and was insufficient to effect any redemption of the property, and that the amount thereof was not sufficient to effect a redemption if it had been paid in gold coin. For all of which your petitioner refers to the complaint in the said suit.

Your petitioner further avers that the said defendants, John Burr, A. W. Rhodes, and W. A. Hammel appeared in the said suit and answered the said complaint, and the same was tried before the superior court of the county of Los Angeles, and judgment therein given on the 11th. day of April, 1900, and duly entered on the 12th. day of April, 1900, whereby it was adjudged that the plaintiff, your petitioner, take nothing by such action, and that the defendants recover of and from the plaintiff their costs and disbursements therein expended.

And your petitioner further shows that the said petitioner did, in the said suit brought by him for the purpose aforesaid, to-wit, to cancel the deed made to the said A. W. Rhodes by the sheriff of Los Angeles county, and to compel the execution of a deed to himself on account of the said purchase, claim and contend that said statute as amended in 1897 was as to the contract contained in the said note and mortgage, void because in violation of the provision of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts, and did set up and claim that the amount paid in pursuance of the said amendment to the said statute made subsequently to the execution of the
J. C. C. said note and mortgage was insufficient to effect a redemption, and the validity of said statute of 1897 was drawn in question upon the ground that it was repugnant to the provision of the Constitution of the United States aforesaid.

223 And your petitioner further shows that the defendants in the said suit did deny that the amount paid by the said Rhodes for such redemption was not sufficient, and that it was decided by the said superior court of the county of Los
J. C. C. Angeles that the amount paid by the said Rhodes was sufficient, and that he did make redemption from the said sale, and in pursuance of the said findings, the court did ad-

judge that the plaintiff, your petitioner take nothing by his suit, and that the defendants recover of and from the plaintiff their costs and disbursements therein expended, and did thereby decide that said statute was valid.

Your petitioner further shows that he moved for a new trial of the said cause in the said superior court, which motion was denied, and that on the 9th. day of June, 1900, your petitioner appealed from the judgment of said superior court of the county of Los Angeles, in said cause, to this court, and on the 22nd. day of September, 1900, appealed to this court from the order denying his motion for a new trial.

That the said appeals were heard in department 2 of the supreme court of the State of California, and that on November 21st., 1902, the said judgment and order of the superior court, denying the new trial were affirmed and it was adjudged that the said amendment to the statute of the State of California made after the execution of the said contract was valid.

And your petitioner further avers that the provisions of redemption hereinbefore mentioned were contained in section 702 of the Code of Civil Procedure of the State of California, and that the amendment of 1897, above stated was an amendment to that section.

Your petitioner further avers that after the decision of said department 2 of the supreme court of California, your petitioner filed a petition for a hearing of the said cause in bank, which said petition was, on December 20th., 1902 denied, and the said judgment in department has become final.

J. C. C.

224 And your petitioner further shows that in the said suit brought by your petitioner against the said Burr, Hammel and Rhodes there has been a judgment in the highest court of this State in which a decision in the said suit could be had, and that in the said action there was drawn in question the validity of the statute of the State of California hereinbefore mentioned amending section 702 of the Code of Civil Procedure, and the statute of said State allowing redemption to be made by delivery of a check to the sheriff for the amount to be paid for the redemption upon the ground that said statutes were repugnant to the Constitution of the United States, and the decision of the State court is in favor of the validity of the said statutes and each of them.

And your petitioner alleges that by the said act of the legislature passed in 1897, amending section 702 of the Code of Civil Procedure of the State of California, the obligation of the contract was impaired contrary to the provision of the Constitution of the United States prohibiting the State from passing any law impairing the obligation of a contract.

And the supreme court of the State of California did err in deciding in favor of the validity of the statute amending section 702 of the Code of Civil Procedure after the execution of the contract, and more particularly shown in the assignments of error presented herewith, and in deciding that under the statute of the State of California payment of the amount of money referred to — effect redemption

could be made by delivery of a check to the sheriff for the plaintiff in error, John D. Hooker, though such check was not made for more than ten months after the time of redemption expired.

Wherefore, your petitioner prays that the writ of error presented herewith from the Supreme Court of the United States to the
225 supreme court of the State of California be allowed, and such other process as will enable your petitioner to obtain a review of the said cause of John D. Hooker against John Burr, A. W. Rhodes and W. A. Hammel, and the correction of the error aforesaid committed by the said supreme court of California, and for such other and further orders as may be proper, and your petitioner will ever pray.

(Signed) J. S. CHAPMAN,
Att'y for Petitioner, John D. Hooker.

Endorsed: Filed Feb. 24th, 1903. Frank C. Jordan, clerk, by J. C. Crooks, deputy.

226 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

JOHN D. HOOKER, Plaintiff and Plaintiff in Error, *v.* JOHN BURR, A. W. RHODES, and W. A. Hammel, Defendants and Defendants in Error.	L. A., No. 1026.	Certificate.

It is hereby certified that this cause was ordered to be, and was heard and determined in department two of the supreme court of the State of California, and that the said court in the said department did, on the 21st. day of November, 1902, decide said cause and rendered judgment affirming the judgment and order appealed from, and that thereafter and within the time prescribed by the rules of said court, to-wit, within twenty days after the filing of said judgment the said plaintiff filed in said court his petition presented to said court for a hearing of the said cause in the supreme court of the State of California in bank, and said petition was considered and acted upon by the said supreme court of the State of California, and on the 20th. day of December, 1902, the said petition for a rehearing was by said court denied, and thereupon said judgment became final and remittitur was issued thereon. The rules and practice of said court during all the times aforesaid, provided and required that where a cause was heard and determined in a department of said court and a judgment therein given, a petition for a hearing in bank should be filed within twenty days after said decision. And by the provisions of the constitution of the State of California, if a hearing in bank were not granted within thirty days after the said judgment of department, then said judgment should become final.

227 And the said judgment in this cause did become final, and the remittitur was duly issued.

Wherefore this certificate is ordered to be made a part of the record and to be attested with the seal of said court.

Dated this 26th. day of Feb., 1903.

(Signed) W. H. BEATTY,
Chief Justice of the State of California.

Attest: FRANK C. JORDAN,
Clerk Supreme Court, State of California,
By J. C. CROOKS,
J. C. C. *Deputy Clerk.*

Endorsed: Filed Feb. 24, 1903 Frank C. Jordan, clerk by J. C. Crooks deputy.

228 UNITED STATES OF AMERICA:

In the Supreme Court of the State of California.

JOHN D. HOOKER, Plaintiff and Plaintiff in Error,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants and Defendants in Error.
} Assignment of Errors.

John D. Hooker, having petitioned the honorable chief justice of the State of California for an order permitting him to prosecute a writ of error to the honorable, the Supreme Court of the United States from the final judgment made and entered in the said cause by the supreme court of the State of California, now makes and presents and files the following assignment of errors herein upon which he will rely for a reversal of said judgment upon said writ:

I.

By the record herein it appears that the supreme court of the State of California erred in deciding that the statute passed by the legislature of the State of California, and approved on the 26th. day of February, 1897, whereby it was provided that the judgment debtor or redemptioner might redeem property from the purchaser at an execution sale at any time within twelve months after the sale on paying the purchaser the amount of his purchase with one per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon, after purchase, and interest on said amount, was valid as to contracts made before the said statute passed.

229 II.

The supreme court of the State of California erred in deciding that the said statute was valid as to the redemption from the sale made to the plaintiff herein under an execution issued under the

judgment given in the suit brought by Charles R. Bishop against Frank M. Kelsey as the administrator of the estate of Ambrose H. Spencer, deceased, Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, and Isabel Spencer, on the 14th day of May, 1898, which judgment was recovered upon a promissory note given on the 16th. day of October, 1893, and a mortgage made on the said date to secure the payment of the said note, although the said note and mortgage were given long prior to the said amendment to the said statute, and though said amendment reduced the amount to be paid from two per cent. a month on the purchase money to one per cent.

III.

The court erred in holding that the amendment to section 702 of the Code of Civil Procedure of the State of California made after the note and mortgage were executed by the said Anna P. Spencer and Ambrose H. Spencer to Jacob Swiggart, and assigned
J. C. C. by him to the said Bishop, and upon which note and mortgage the said judgment was recovered whereon the execution was issued and the sale made to the said John D. Hooker, was valid and was not in violation of the provision of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of the contract, notwithstanding the said amendment reduced the amount to be paid upon said redemption.

230 IV.

The supreme court of the State of California erred in deciding that though the statute, to-wit, section 702 of the Code of Civil Procedure of the State of California as it existed at the time the note and mortgage were executed by the said Anna P. Spencer and Ambrose H. Spencer provided that the judgment debtor or redemptioner might redeem the property from the purchaser at any time within six months after the sale on paying the purchaser the amount of his purchase with two per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser might have paid thereon after purchase, and interest on such amount, and though the said statute, to-wit, the said section 702 of the Code of Civil Procedure of the State of California was amended after the said contract, to-wit, the said note and mortgage, was made, reducing the amount to be paid, and declaring that the judgment debtor or redemptioner might redeem the property at any time within twelve months after the sale on paying the purchaser the amount of his purchase with one per cent. per month thereon in addition, up to the time of redemption, together with any assessment or taxes which the purchaser might have paid thereon after purchase, and interest on such amount, yet the said statute as so amended was valid, and that a redemption of the property from the sale upon an execution issued upon a judgment recovered upon the said note and mortgage, might be redeemed and was redeemed by the payment of the purchase money with in-

terest at one per cent. per month from the date of the purchase, together with the other payments mentioned, and that said statute was not in violation of the provisions of the Constitution of the United States prohibiting any State from passing a law impairing the obligation of a contract.

231 V.

The supreme court of the State of California erred in deciding that an act of the legislature of the State of California passed after the execution of the note and mortgage given by Anna P. and Ambrose H. Spencer to Jacob H. Swiggart, upon which the judgment was recovered and a sale upon an execution thereof made to this plaintiff, providing that a redemption could be made by paying a less amount than was required by the laws of the State of California at the time said contract was made, was valid and not in violation of the Constitution of the United States.

VI.

The supreme court of the State of California erred in deciding that the amount paid by the defendant Rhodes to the sheriff of the county of Los Angeles for the redemption of the said property from the sale made to the said John Hooker under the execution issued upon the judgment aforesaid was sufficient to effect a redemption in that the said amount was fixed by a statute of the State of California passed subsequently to the execution of the said note and mortgage, and was a less amount than was required under the statutes of the State of California to make redemption at the time the said note and mortgage were made.

VII.

The supreme court of the State of California erred in deciding that an act of the legislature of the State of California providing for a redemption from a sale under execution by the payment of a less amount than was required by statute at the time a note and mortgage given to secure the same were made, is valid and not in violation of the provision of the Constitution of the United States prohibiting any State from passing a law impairing the obligation of a contract.

232 VIII.

The supreme court of the State of California erred in deciding that the act of the legislature of the State of California passed in 1897, amending section 702 of the Code of Civil Procedure of the State of California, was valid as to redemption from execution sales upon judgments recovered upon contracts made prior to the passage of the said amendment, and which amendment reduced the amount to be paid below that which was required by the statute existing at the time of the contract.

IX.

The supreme court of the State of California erred in deciding that the amount of the check delivered to the sheriff of Los Angeles county for the redemption of the said property from the sale made to the plaintiff in error, John D. Hooker, was sufficient in amount to effect a redemption.

X.

The supreme court of the State of California erred in giving judgment for the defendants in this action and against the plaintiff.

XI.

The supreme court of the State of California erred in affirming the judgment of the superior court in this cause.

XII.

The supreme court of the State of California erred in deciding that the said Rhodes paid to the plaintiff, John D. Hooker, any sum of money whatever within the time prescribed by the statutes of the State of California for the redemption of said property.

233 XIII.

The supreme court of the State of California erred in deciding that the defendant, A. W. Rhodes, did make a valid redemption from the sale of the property in controversy made to the plaintiff in error upon the execution issued upon the judgment aforesaid in this, that no money was paid within the time allowed for the redemption, nor was the amount paid sufficient, and plaintiff in error was deprived of his property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

234 By the record aforesaid it appears that the judgment of the said supreme court aforesaid was given for the defendants in error against the plaintiff in error, and did affirm the judgment of the said superior court of the county of Los Angeles and the various rulings and decisions made therein and hereinbefore set forth, whereas by the law of the land the said judgment of the supreme court of the State of California ought to have reversed the judgment of the said superior court of the county of Los Angeles, and the said decision ought to have been against the validity of the said statute of the State of California, and that said statutes were repugnant to the Constitution of the United States and void, and the said plaintiff in error prays that the judgment and decision of the supreme court of the State of California may be reversed, annulled and altogether held for nought, and that the said court be directed to reverse the decision of the superior court of the county of Los Angeles, State

of California, and that the plaintiff in error may have such other relief as he may be entitled to.

(Signed) J. S. CHAPMAN,
Attorney for John D. Hooker, Plaintiff in Error.

Endorsed: Filed Feb. 24/03. Frank C. Jordan, clerk, by J. C. Crooks, deputy.

235 In the Supreme Court of the State of California.

JOHN D. HOOKER, Plaintiff and Plaintiff in Error,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants and Defendants in Error.
} Order Fixing Bond on Application for a Writ of Error.

The plaintiff, John D. Hooker, having this day filed his petition for a writ of error from the decision and judgment thereof made and entered herein to the Supreme Court of the United States, together with an assignment of errors within due time, and also praying that an order be made fixing the amount and security which the plaintiff should give and furnish upon the said writ of error, and said petition having this day been granted, and the said writ of error duly allowed,

Now therefore it is ordered that the bond to be given by the said plaintiff John D. Hooker upon said writ of error, and the amount thereof is hereby fixed at the sum of three thousand dollars ($3,000) and the said plaintiff in error shall file with the clerk of said court a good and sufficient bond in the sum of three thousand dollars to the effect that if the said plaintiff in error shall prosecute the said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the said obligation to be void; otherwise to remain in full force and effect. The said bond to be approved by this court.

Dated this 24th day of February, 1903.

(Signed) W. H. BEATTY,
J. C. C. *Justice of the Supreme Court of the State of California.*

Endorsed: Filed: Feb. 24/03: Frank C. Jordan, clerk, J. C. Crooks, deputy.

236 In the Supreme Court of the State of California.

JOHN D. HOOKER, Plaintiff and Plaintiff in Error,
v.
JOHN BURR, A. W. RHODES, and W. A. Hammel, Defendants and Defendants in Error.
} Bond on Application for a Writ of Error.

Know all men by these presents, that we, John D. Hooker as principal, and Fred L. Baker and Horace R. Boynton as sureties, are held and firmly bound unto the said defendants John Burr, A. W. Rhodes and W. A. Hammel in the full and just sum of three thousand dollars ($3,000) to be paid to the said defendants John Burr, A. W. Rhodes and W. A. Hammel, their certain attorneys or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 21st day of February in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a session of the supreme court of the State of California in a suit pending in said court between said John D. Hooker, plaintiff, and the said John Burr, A. W. Rhodes and W. A. Hammel, defendants, a final judgment was rendered against the said plaintiff, John D. Hooker, and the said John D. Hooker having obtained from the said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants John Burr, A. W. Rhodes and W. A. Hammel, is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington in the District of Columbia.

Now the condition of the above obligation is such that if the said John D. Hooker shall prosecute his writ of error to effect
237 and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) JOHN D. HOOKER.
FRED L. BAKER.
HORACE R. BOYNTON.

STATE OF CALIFORNIA, *County of Los Angeles*, } *ss:*

Fred. L. Baker and Horace R. Boynton, the persons named in and who subscribed the foregoing bond as the sureties thereto, being severally duly sworn, each for himself says: That he is worth the amount specified in the said undertaking as the penalty thereof, to-wit, three thousand dollars, over and above all of his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

(Signed) FRED L. BAKER.
HORACE R. BOYNTON.

Subscribed and sworn to before me this 21st day of February, 1903.

[SEAL.] (Signed) WARD CHAPMAN,
Notary Public in and for the County of Los Angeles, State of California.

238 The foregoing and within bond is hereby approved, February 24th, 1903.

(Signed) W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed: Feb. 24/03. Frank C. Jordan, clerk, by J. C. Crooks, deputy.

239 In the Supreme Court of the State of California.

JOHN D. HOOKER, Plaintiff and Plaintiff in Error,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants and Defendants in Error.
} Order Allowing Writ of Error.

Upon motion of J. S. Chapman, attorney for plaintiff, John D. Hooker, and upon filing a petition for a writ of error and an assignment of errors.

It is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Supreme Court the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at three thousand dollars ($3,000.)

Dated this 24th. day of February, 1903.

(Signed) W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed: Feb. 24/03. Frank C. Jordan, clerk. By J. C. Crooks, deputy.

240 UNITED STATES OF AMERICA, ss:

JOHN D. HOOKER, Plaintiff and Plaintiff in Error,
vs.
JOHN BURR, A. W. RHODES, and W. A. HAMMEL, Defendants and Defendants in Error.
} Citation.

To John Burr, A. W. Rhodes, and W. A. Hammel, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington in the District of Columbia, on the 25th day of April, A. D. 1903, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein John D. Hooker is plaintiff and plaintiff in error in this action, and you are defendants in the action and defendants in error, to show cause, if any there be, why

the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 24th day of February, 1903, and the Independence of the United States the one hundred and twenty-eighth.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

241 Due service of within citation and receipt of copy of writ of error mentioned therein this day admitted, and a copy of the same served upon us at Los Angeles city, California, this 26th day of February, 1903.

E. C. BOWER,
ANDERSON & ANDERSON,
Attorneys for Defendants in Error.

242 [Endorsed:] 12 R. L. A. 1026 In the supreme court of the State of California. John D. Hooker, pl'ff & pl'ff in error, *vs.* John Burr *et al.*, def'ts & def'ts in error. Citation. Filed Feb. 28 1902 Frank C. Jordan, clerk By J. C. Crooks deputy. J. S. Chapman, attorney at law rooms 100–3 Potomac block, Los Angeles, California.

243 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California before you or some of you, being the highest court of law or equity of the said State, in which a decision could be had in that certain suit between John D. Hooker, plaintiff and plaintiff in error, and John Burr, A. W. Rhodes and W. A. Hammel, defendants and defendants in error, wherein was drawn in question the validity of statutes of the State of California on the ground of their being repugnant to the Constitution and treaties and laws of the United States, and the decision was in favor of the validity of said statutes, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said Constitution and treaty, and manifest error hath happened, to the great damage of the said John D. Hooker, the plaintiff in error as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to

the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 25th day of April next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the
244 said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should have been done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 24th day of February, 1903.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Northern District of California,
By W. B. BEAIZLEY,
Deputy Clerk.

Allowed by
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

I hereby certify that a copy of the foregoing writ of error was, on the 24th day of February, 1903, lodged in the clerk's office of said supreme court of the State of California for the said plaintiff in error.

[Seal Supreme Court of California.]

FRANK C. JORDAN,
Clerk of the Supreme Court of the State of California,
By J. C. CROOKS, *Deputy.*

245 [Endorsed:] Original. 13 R. L. A. No. 1026. In the supreme court of the State of California. John D. Hooker, pl'ff & pl'ff in error, *vs.* John Burr, *et al.*, def'ts & def'ts in error. Writ of error. Filed Feb. 24, 1902 Frank C. Jordan, clerk, by J. C. Crooks deputy. J. S. Chapman, attorney at law rooms 100–3 Potomac block, Los Angeles, California.

246 In the Supreme Court of the State of California.

JOHN D. HOOKER, Plaintiff,
vs.
JOHN BURR ET AL., Defendant.

I Frank. C. Jordan clerk of the supreme court of the State of California hereby certify that I have compared the foregoing, copies of the transcript, judgment, opinion, petition for writ of error, certificate, assignment of errors, bond on appeal to U. S. Supreme Court, order fixing bond, order allowing writ of error, order denying a rehearing, minute order submitting cause, with the original papers in the above entitled cause, and said copies contain a full true and correct copy of said original papers.

Said copies together with the original writ of error, and original citation constituting the papers on appeal to the United States Supreme Court U. S. A. from the supreme court of the State of California.

In witness whereof I have hereunto set my hand and the seal of the court, this 21st day of March, A. D. 1903.

[Seal Supreme Court of California.]

FRANK. C. JORDAN, *Clerk*,
By J. C. CROOKS, *Deputy*.

[Endorsed:] 14 L. A. No. 1026 In the supreme court, State of California. John D. Hooker pl't'f *vs.* John Burr *et al.* resp.

Endorsed on cover: File No. 18,898. California supreme court. Term No. 670. John D. Hooker, plaintiff in error, *vs.* John Burr, A. W. Rhodes, and W. A. Hammel. Filed April 17th, 1903.

24064

Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 263.

John D. Hooker,
Plaintiff in Error,
vs.
John Burr. A. W. Rhodes and W. A. Hammel,
Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

I.

Statement of the Case.

This suit was brought against the defendants John Burr, A. W. Rhodes and W. A. Hammel as defendants, the said John Burr having been the sheriff of the county of Los Angeles, state of California, at the time of the execution sale hereinafter stated, and W. A. Hammel, as his successor in the office of sheriff, to cancel the deed made by the said John Burr as sheriff,

to A. W. Rhodes under the said execution sale, and against Burr and Hammel to compel the execution of a deed to the plaintiff for the same property, the said A. W. Rhodes being made a party defendant because of his interest under the deed executed by the sheriff to him, and the facts out of which the right of action is alleged to have arisen were set forth in the original complaint, but more fully and more correctly in the amended complaint.

The original complaint appears in the transcript, pages 1 to 6, and the amended complaint, pages 15 to 22. So far as pertinent to the inquiry in this court, those facts are as follows:

On the 16th day of October, 1893, Anna P. Spencer and Ambrose H. Spencer, then being owners of certain property situated in the city of Los Angeles, county of Los Angeles, state of California, described as lot 3, and the southerly 17¾ feet of lot 4 in block 52 of the Huber tract according to a map of said tract recorded in the office of the county recorder of Los Angeles, in book 2, page 281 Miscellaneous Records [Trans. p. 17, par. 7], made their promissory note to one Jacob Swiggart for the sum of five thousand ($5,000) dollars, bearing date the 16th day of October, 1903, and at the same time executed a mortgage to Swiggart to secure the payment of the promissory note as therein provided. [Trans. p. 15, par. I of the amended complaint.]

This note and mortgage were assigned by Swiggart to Charles R. Bishop.

Subsequently, and before the commencement of the

action about to be mentioned, Ambrose H. Spencer died, and Frank M. Kelsey was appointed the administrator of his estate. [Tr. p. 16.]

Afterwards Bishop commenced a suit in the superior court of the county of Los Angeles, state of California, against Frank M. Kelsey as administrator of the estate of Ambrose H. Spencer, deceased, Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, Isabel Spencer, and others sued by fictitious names, to recover the amount due, and to foreclose the mortgage.

On the 14th of May, 1898, a judgment was entered in said cause whereby it was adjudged and decreed that there was due to the plaintiff upon the promissory note mentioned, the sum of six thousand, seven hundred eighty-two and 49-100 ($6,782.49) dollars, and that said sum was a lien upon the mortgaged premises, and also a judgment for the sale of the mortgaged premises for the payment of the sum so found to be due. [Tr. p. 16, par. 4.]

On the 16th of May, 1898, an execution was issued upon the said judgment, and the sheriff did, on the 13th day of June, 1898, sell to the plaintiff in error the said mortgaged premises, for the sum of nine thousand five hundred ($9,500) dollars, and a certificate of sale was issued to him.

At the time this mortgage was given, the statutes of the state of California provided for a redemption of real property from execution sale, and section 702 of the Code of Civil Procedure at that time was as follows:

"Sec. 702. The judgment debtor or redemptioner may redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase with two per cent. per month thereon in addition, up to the time of the redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest."

On March 27, 1895, the legislature amended this section 702 so as to provide that the judgment debtor or redemptioner might redeem the property from the purchaser any time within six months after the sale, on paying the purchaser the amount of his purchase with one per cent. per month thereon, up to the time of redemption, together with any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest.

Stats. of California, 1895, p. 226.

On February 26, 1897, the section was again amended by the legislature, the language of the section remaining the same except that under this last amendment referred to the time of redemption was extended to twelve months, and the amount to be paid for re-

demption should be the amount of the purchase with one per cent per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser might have paid, etc.

Stats. of 1897, p. 41.

The only changes made in these amendments of the statute referred to were, the first as to the amount to be paid, the second as to the time of redemption.

One E. R. Nichols brought a suit in the superior court of the county of Los Angeles, state of California, against Anna P. Spencer, to recover a sum alleged to be due to the plaintiff from her, and such proceedings were had in that action that on the 30th day of September, 1897, Nichols recovered a judgment against the said Anna P. Spencer in the said suit, for the sum of one thousand fifteen and 30-100 ($1,015.30) dollars and costs, which judgment was docketed in the superior court on the 1st day of October, 1897. [Tr. p. 18, par. X.] Claiming that under this judgment and as assignee of Nichols to be a redemptioner under the statutes of California, Rhodes did, on the 12th day of December, 1898, deliver to John Burr, the sheriff of the county of Los Angeles, who had made the sale of the said property to the plaintiff, a check bearing date the 12th day of December, 1898, for the sum of ten thousand and seventy ($10,070) dollars, which check was drawn on the First National Bank of Los Angeles, by Clark & Bryan, and a copy of which is set forth in the amended cmplaint, to

which we are now referring. That copy, after the date, is:

> "Pay to the order of John Burr, sheriff, $10,070 ten thousand seventy dollars. To the First National bank, Los Angeles, Cal.
> (Signed) "CLARK & BRYAN."

A two cent revenue stamp was placed on the said check.

The amount of this check, it will be seen, is the amount of the purchase money paid by Hooker, to-wit, $9,500, with one per cent. per month interest from the time of the sale, and he delivered this check to the sheriff on the 12th day of December, 1898, together with a notice addressed to the plaintiff, Hooker, as such purchaser, that he, Rhodes, did redeem the said property from the said sale, and in such notice made the statement that he redeemed as a judgment creditor of Anna P. Spencer, and not otherwise.

There was no other or different payment of any sum whatever ever made to the sheriff for the redemption of said property, and it is alleged that the check was no payment to the sheriff, and was insufficient in amount to effect the redemption, and it was not payable in gold coin at all. [Tr. pp. 17-18, par. IX.]

On the 10th of June, 1897, prior to the recovery of the judgment by Nichols, which judgment had been assigned to Rhodes, Anna P. Spencer had executed and delivered to Orange E. Dickey a conveyance of this land which had been sold to Hooker. [Tr. p. 19, par. XIII.]

And through Dickey the property had passed to Charles J. Shepherd (*id.*).

There are allegations as to the invalidity of this Nichols judgment, but they are not questions of a federal character, and having been decided by the state court against us, we suppose it is conclusive.

At the November election of 1898 W. A. Hammel, one of the defendants, was elected sheriff of the county of Los Angeles, and qualified as such sheriff on the first Monday in January, 1899, and became the successor in that office of John Burr, and on the 18th of February, 1899, Hammel, as such sheriff, executed an instrument purporting to be a deed of conveyance of the property to A. W. Rhodes as such redemptioner from the said sale, and Rhodes is claiming to be the owner of the property under that deed of conveyance.

It is then alleged that this conveyance by Hammel as the successor of Burr is illegal and void. Furthermore, that the plaintiff has never been paid the sum so delivered to the sheriff for the purpose of effecting its pretended redemption.

Prior to the commencement of the action, the plaintiff tendered to Hammel, the present sheriff of the county of Los Angeles, the fee for making a sheriff's deed to the property sold, and demanded of Hammel the execution of a deed of conveyance to the plaintiff as the purchaser at the said sale, and he also tendered the amount to John Burr, the former sheriff of the county, and made the same demand upon him, and the amount of the fee was deposited in the court to be delivered to either Hammel or Burr upon the execution of the deed demanded. [Tr. pp. 20-21.]

The plaintiff further alleged and proved that the check above mentioned which was delivered to Burr by Rhodes was held by Burr until the term of his office expired, and he indorsed it to his successor. And at the time of the filing of this amended complaint, which was on November 20, 1899 [Tr. p. 22, fol. 38], this check remained in the possession of the sheriff, and the sheriff had never obtained the money upon it, nor had he presented the check or had the money transferred to his name in the bank.

The findings of the court will be found at pages 28-29.

The court found that on the 10th of June, 1897, Anna P. Spencer made this conveyance to Dickey, and through him to Charles J. Shepherd, for the purpose of, and intended it, as a security to Charles J. Shepherd for the debt that she owed him, and that the deed did not divest the title of Anna P. Spencer to the said property.

That Rhodes was the owner of the judgment of Nichols against Spencer on the 13th of December, 1898, and that he did, on that day, redeem the said property.

That Rhodes offered the sheriff $10,070 in gold coin of the United States in payment of the redemption of the property, and that the check delivered by Rhodes to the sheriff in making the redemption had been paid. [Tr. pp. 28-29.]

Now the original complaint in this cause was filed March 14, 1899 [Tr. p. 6]; the amended complaint, as already stated, was filed November 20, 1899. And

while the finding that the check had been paid was true at the time the finding was made, which was the 11th of April, 1900, it never was paid until after the amended complaint was filed, and it was charged that the money had never been paid to the sheriff for redemption.

These facts appear without contradiction in the statement on motion for a new trial which was made in the superior court of Los Angeles, and denied.

And it was finally admitted by the parties that the check was cashed on the 25th or 26th of November, 1899, nearly a year after it was delivered to the sheriff. [Tr. pp. 101-102.]

An appeal was taken from the judgment and order denying the new trial, to the supreme court of the state of California, and was heard in department 2, where the judgment and order appealed from were affirmed. [Tr. pp. 114-120.]

A petition for a rehearing was filed by the plaintiff, Hooker, and was denied December 20, 1902. [Tr. p. 120.]

And the order denying it was filed December 22, 1902.

On February 24, 1903, the plaintiff, John D. Hooker, petitioned the Chief Justice of the Supreme Court of California for a writ of error to this court. [Tr. pp. 121-127.]

Was allowed the 24th of February, 1903. [Tr. p. 134, fol. 239.]

The bond given and approved. [Tr. pp. 133-134, fols. 236-238.]

And the Honorable Chief Justice issued a certificate showing that the cause was decided in the supreme court on the 21st of November, 1902; that within 20 days after the filing of the said judgment, plaintiff filed in the supreme court of California, his petition for a hearing of the cause in bank, and such petition was considered and acted upon by the supreme court, and on the 20th day of December, 1902, was denied. And thereupon the judgment became final, and the remittitur was issued. That the rules and practice of the court provided and required that where a cause was heard and determined in department, and judgment given therein, a petition for a hearing in bank should be filed within 20 days after said decision. [Tr. pp. 127-128, fols. 226-227.]

II.

ERRORS ASSIGNED.

The errors relied upon by the plaintiff in error on this writ are the following:

1. The supreme court of the state of California erred in deciding that the amendment to Sec. 702 Code of Civil Procedure, passed by the legislature of the state of California, and approved on the 26th day of February, 1897, whereby it was provided that a judgment debtor or redemptioner might redeem property from the purchaser at an execution sale at any time within twelve months after the sale on paying the purchaser the amount of his purchase, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, with

interest thereon, was valid as to contracts made before the said statute was passed.

2. The supreme court of the state of California erred in deciding that the said statute was valid as to the redemption from the sale made to the plaintiff herein under an execution issued under the judgment given in the suit brought by Charles R. Bishop against Frank M. Kelsey, as the administrator of the estate of Ambrose H. Spencer, deceased, Anna P. Spencer, T. L. Stiles, Orange E. Dickey, James Gordon Spencer, and Isabel Spencer, on the 14th day of May, 1898, which judgment was recovered upon a promissory note given on the 16th day of October, 1893, and a mortgage made on the said date to secure the payment of the said note, although the said note and mortgage were given long prior to the said amendment to the said statute, and though said amendment reduced the amount to be paid from two per cent. a month on the purchase money to one per cent.

3. The court erred in holding that the amendment to section 702 of the Code of Civil Procedure of the State of California, made after the note and mortgage were executed by the said Anna P. Spencer and Ambrose H. Spencer to Jacob Swiggart, and assigned by him to the said Bishop, and upon which note and mortgage the said judgment was recovered whereon the execution was issued and the sale made to the said John D. Hooker, was valid and not in violation of the provision of the constitution of the United States prohibiting any state from passing any law impairing the obligation of a contract, notwithstanding the said

amendment reduced the amount tc be paid upon said redemption.

4. The supreme court of the state of California erred in deciding that the statute, to-wit, section 702 of the Code of Civil Procedure of the state of California, though as it existed at the time the note and mortgage were executed by the said Anna P. Spencer and Ambrose H. Spencer provided that the judgment debtor or redemptioner might redeem the property from the purchaser at any time within six months after the sale on paying the purchaser the amount of his purchase with two per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser might have paid thereon after purchase, and interest on such amount, and though the said statute, to-wit, the said section 702 of the Code of Civil Procedure of the state of California was amended after the said contract, to-wit, the said note and mortgage, was made, reducing the amount to be paid, and declaring that the judgment debtor or redemptioner might redeem the property at any time within twelve months after the sale on paying the purchaser the amount of his purchase with one per cent. per month thereon in addition, up to the time of redemption, together with any assessment or taxes which the purchaser might have paid thereon after purchase, and interest on such amount, yet the said statute as so amended was valid, and that a redemption of the property from the sale upon an execution issued upon a judgment recovered upon the said note and mortgage, might be redeemed, and was redeemed by the

payment of the purchase money with interest at one per cent. per month from the date of the purchase, together with the other payments mentioned, and that said statute was not in violation of the provisions of the constitution of the United States prohibiting any state from passing a law impairing the obligation of a contract.

5. The supreme court of the state of California erred in deciding that an act of the legislature of the state of California passed after the execution of the note and mortgage given by Anna P. and Ambrose H. Spencer to Jacob H. Swiggart, upon which the judgment was recovered and a sale upon an execution thereof made to this plaintiff, providing that a redemption could be made by paying a less amount than was required by the laws of the state of California at the time said contract was made, was valid and not in violation of the constitution of the United States.

6. The supreme court of the state of California erred in deciding that the amount paid by the defendant Rhodes to the sheriff of the county of Los Angeles for the redemption of the said property from the sale made to the said John D. Hooker under the execution issued upon the judgment aforesaid was sufficient to effect a redemption, in that the said amount was fixed by a statute of the state of California passed subsequently to the execution of the said note and mortgage and was a less amount than was required under the statutes of the state of California to make a redemption at the time the said note and mortgage were made.

7. The supreme court of the state of California

erred in deciding that an act of the legislature of the state of California providing for a redemption from a sale under execution by the payment of a less amount than was required by statute at the time a note and mortgage given to secure the same were made, is valid and not in violation of the provision of the constitution of the United States prohibiting any state from passing a law impairing the obligation of a contract.

8. The supreme court of the state of California erred in deciding that the act of the legislature of the state of California passed in 1897, amending section 702 of the Code of Civil Procedure of the state of California, was valid as to redemption from execution sales upon judgments recovered upon contracts made prior to the passage of the said amendment, and which amendment reduced the amount to be paid below that which was required by the statute existing at the time of the contract.

9. The supreme court of the state of California erred in deciding that the amount of the check delivered to the sheriff of Los Angeles county for the redemption of the said property from the sale made to the plaintiff in error, John D. Hooker, was sufficient in amount to effect a redemption.

10. The supreme court of the state of California erred in giving judgment for the defendants in this action and against the plaintiff.

11. The supreme court of the state of California erred in affirming the judgment of the superior court in this cause.

12. The supreme court of the state of California

erred in deciding that the said Rhodes paid to the plaintiff, John D. Hooker, any sum of money whatever within the time prescribed by the statutes of the state of California for the redemption of said property.

13. The supreme court of the state of California erred in deciding that the defendant, A. W. Rhodes, did make a valid redemption from the sale of the property in controversy made to the plaintiff in error upon the execution issued upon the judgment aforesaid in this, that no money was paid within the time allowed for the redemption, nor was the amount paid sufficient, and plaintiff in error was deprived of his property without due process of law, in violation of the fourteenth amendment to the constitution of the United States.

III.

POINTS OF LAW AND FACT.
Brief of the Argument.

1. The laws existing at the time a contract is made, enter into and become a part of it.

United Bank v. Board of Commissioners, 90 F. 7. 9;

Barnitz v. Beverly, 163 U. S. 118; 41 L. Ed. 93, 98;

Deck v. Whitman, 96 F. 884-885.

And the laws so existing at the time of the contract are the measure of its obligations.

Bronson v. Kinzie, 1 How. 319; 11 L. Ed. 143, 144, 146.

We quote from this case the following passage:

> "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract."
>
> 11 L. Ed. pp. 144-145.

The same effect is

> McCracken v. Hayward, 2 How. 613; 11 L. Ed. 397, 399.

And the laws so existing at the time of the contract are as completely a part of the contract as though they had been written therein.

> White v. Hart, 13 Wall. 653; 20 L. Ed. 685, 688.

And in this case it is further said:

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy, the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion. The obligation of

a contract 'is the law which binds the parties to perform their agreement.' "

Rees v. City of Watertown, 19 Wall. 107; 22 L. Ed. 72, 76;

Toledo etc. R. R. Co. v. Hamilton, 133 U. S. 301; 33 L. Ed. 905, 908;

Central Trust Co. v. Charlotte C. & A. R. Co., 65 F. 287, 289;

Southern Ry. v. Bouknight, 70 F. 442, 446.

We quote the following from the opinion:

"The Circuit Court was of opinion that all contracts are made with reference to the law of the state in which the subject matter of the contract is and in which the contract is made. This certainly is true with regard to mortgages by a railroad corporation. The law enters into and becomes a part of the contract as if it were there in express terms."

The law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage.

East Tennessee, Va. & Ga. R. Co. v. Frazier, 139 U. S. 288; 35 L. Ed. 196.

2. The redemption laws existing at the time of the execution of a mortgage constitute a part of the obligations of the mortgage contract.

See cases above cited. Also

1 Jones on Mortgages, sec. 663, where it is said that the law in force at the time of the delivery of the mortgage governs its validity and construction so far as these are affected by statute.

2 Jones on Mortgages, sec. 1051, after stating the same proposition and referring to section 663, the author says:

> "It is equally true that the law existing at the time of the making of the mortgage governs in respect to redemption and foreclosure after a foreclosure sale."

And in the same section, that a statute giving a right of redemption for two years after the sale, is unconstitutional and void as applied to mortgages executed prior to the enactment of the statute, as impairing the obligation of the contract. In like manner a law shortening the time of redemption from two years to one year after sale, is unconstitutional in respect to mortgages existing at the time it took effect. And

2 Jones on Mortgages, sec. 1321, from which we quote the following:

> "The law in force when the mortgage was executed must be followed in foreclosing it, though there be a change in the meantime. The remedy so provided becomes a part of the contract of the parties, and any change by statute substantially affecting it to the injury of the mortgagee is held to be a law impairing the obligation of the contract within the meaning of the constitution of the United States."

3. Redemption laws existing at the time of a purchase, whether under execution or at a tax sale, become a part of the contract, and any law impairing the obligation of that contract is in violation of the provision of the constitution of the United States prohibit-

ing any state from passing a law impairing the obligations of a contract.

Thresher v. Atchison, 117 Cal. 73.

4. The test as to whether a contract has been impaired, is whether its value has by legislation been diminished.

It is well settled that the provision of the constitution of the United States prohibiting a law impairing the obligation of a contract, does not deal with any question of more or less. It is not the degree, or manner, or cause, of the impairment, but a question simply of whether its obligation has been to any degree impaired.

Heath & Milligan Mfg. Co. v. Union Oil & Paint Co., 83 F. 777.

A law shortening or extending the time of redemption as it existed when a mortgage was made, does impair the obligation of the contract, and is void.

Barnitz v. Beverly, 163 U. S., *supra;*

Savings Bank of San Diego Co. v. Barry, 126 Cal. 413, 417;

Hollister v. Donahue, 78 N. W. 960;

State v. Sears, 46 Pac. 785.

Statute providing for a stay of execution for a year on a decree for a foreclosure of a mortgage made before any such law existed, is void.

Swinburne v. Mills, 50 Pac. 489.

Statute authorizing redemption from a sale under a foreclosure of a mortgage when no such right ex-

isted when the mortgage was made, impairs the obligation of the mortgage contract.

Paris v. Nordburg *et al.*, 51 Pac. 799.

Statute providing that upon making of an assignment by a debtor within ten days after the levy of an attachment, the attachment and levy shall be dissolved and the property attached or levied upon, turned over to such assignee or receiver, was held as to indebtedness contracted before the passage of the act to impair the obligation of the contract.

Heath & Milligan Mfg. Co. v. Union Oil & Paint Co., 83 F. 776;

State v. Gilliam, 45 Pac. 661; 33 L. R. A. 557;

Second Ward Savings Bank v. Schranck, 39 L. R. A. 575;

Lead & Color Works v. Union Oil & Paint Co., 42 L. R. A. 331.

Statutes staying a sale under a foreclosure, for a year, and requiring that it be for 80% of the appraised value, impairs the obligation of a mortgage contract made prior to its passage.

Bettman v. Cowley, 40 L. R. A. 819.

Act providing for the redemption of real property sold on execution, so far as intended to apply to sales on judgments rendered on contracts at and before its passage, are in violation of the contract.

Scobey v. Gibson, 79 Am. Dec. 490.

A provision of the constitution, or a legislative act,

which substantially changes the remedies, is utterly void.

Gunn v. Barry, 82 U. S. 610; 21 L. Ed. 212.

A law fixing the amount of percentage to be paid in order to effect a redemption of land from a sale under execution, in force at the time of the sale, forms an element of the purchase at the sale, and constitutes a term in the contract under which the purchaser paid his money to the officer, and the legislature has no power to impair the obligation of such contract by diminishing the amount subsequently to the sale.

Thresher v. Atchison, 117 Cal. 73.

Redemption of land sold to the state for delinquent taxes, is governed by the law in force at the date of the sale.

And it is beyond the power of the legislature, after the tax sale, to impose more onerous conditions upon the right to redeem than those which existed when the sale was made. And the retroactive provision of such act is unconstitutional and void in so far as it purports to impair the vested right of redemption which is a condition of the contract of purchase when made.

Teralta etc. Land Co. v. Shaffer, 116 Cal. 518.

5. Mortgage contract is not merged in the judgment, and a purchaser under execution sale under foreclosure decree is in privity with the mortgage contract.

Romig and Harding v. Gillett, decided in this court November 17, 1902, reported in the Advance Sheets of date December 15, 1902, October Term of that year, No. 52, p. 40, 42.

In that case a motion to vacate a judgment for foreclosure and all proceedings subsequent thereto, upon the ground that the moving party had not been properly served with process, was granted, and an order made that she be put in possession of the premises, which order and judgment of the trial court was affirmed by the Supreme Court of the territory, whereupon the case was brought before this court upon an appeal. And the court said, among other things:

> "Assuming that that section is not fully applicable because of the defect in the affidavit, yet the appellee comes into a court of equity seeking relief against the foreclosure of a mortgage. In such a case there are almost always certain conditions of relief. If the mortgage be valid, the rights of the mortgagee and those claiming under him are to be protected. Generally such rights are protected by requiring payment of the mortgage debt, and granting a right of redemption. It is true that this right of redemption is a favored right. * * * But it is only a right of redemption which in this case and under the facts disclosed the appellee is entitled to. She does not pretend * * * that the mortgage was invalid, or that it had been paid. She claims by a deed subsequent to the mortgage, and simply insists that she has not had her day in court, and therefore her rights, which, so far as appears, are only the rights of redemption, have not been cut off. *Harding, as the grantee of the purchaser at the foreclosure sale, stands in the shoes of the mortgagee.*"

In Bryan v. Brasius, 162 U. S. 415, 40 L. Ed. 1022, 1023, it was held that a mortgagor of land could not

recover in ejectment against a mortgagee in possession after breach of the condition, or against persons holding possession under the mortgagee. And also that an irregular judicial sale made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such.

In 2 Jones on Mortgages, section 1654, the author says:

> "As the title of the purchaser relates back to the time of the execution of the mortgage, it does not matter to him what disposition the mortgagor may afterwards have made of the property if the foreclosure is perfect. All conditions and reservations and easements, as well as all incumbrances or liens, he may have afterwards imposed upon the property are extinguished. In this respect the purchaser's rights are the same whether the sale be under a decree of a court of equity, under a judgment in *scire facias*, or under a power in the mortgage or trust deed. The title takes effect by virtue of the original deed; the sale carries that title, and cuts off all liens and interests created subsequent to the mortgage.
>
> "Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrancers are made parties to the bill, the title under the mortgage foreclosed is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor as it stood at the time of the making of the mortgage."

In Vallejo Land Association v. Viera, 48 Cal. 572, the court said that although in some sense the mortgage deed merged in the decree, it yet remained a muniment of title which passed to the purchaser at the mortgage sale, to be looked to not only for the purpose of ascertaining the point of time at which the mortgage lien attached, but also the estate purporting thereby to have been conveyed by way of mortgage.

To the same effect is

People's Savings Bank v. Hodgdon, 64 Cal. 95;
Golden State etc. Iron Works v. Davidson, 73 Cal. 389, 391-392.

In Wilson v. White, 84 Cal. 239, the court said:

"Upon the authority of the foregoing cases, it must be held that the 'Warnen' deeds transferred the title. And it makes no difference in the result whether the defendant was a party to the foreclosure of the Bradley mortgage or not. If he was a party, and the decree cut off his interest, it is manifest that whatever rights he has in the property he got under the deed from 'Warnen,' which was ample consideration for what he promised to pay. If he was not a party, then, although his rights under the contract were not cut off, yet the purchaser is *in equity the assignee of the debt secured by the Bradley mortgage.*"

Carpentier v. Brenham, 40 Cal. 221;
Rumpp v. Gerkens, 59 Cal. 496;
Henderson v. Grammar, 66 Cal. 335.

"And a conveyance by him or his grantee operates as a release of this right, and consequently was consideration for a promise to pay for it."

6. The appellant, John D. Hooker, the purchaser at the foreclosure sale, is in privity with the mortgage contract, and entitled to invoke the protection of the constitution of the United States against any laws impairing the obligation of that contract.

The decisions of the Supreme Court of the state of California have, as it seems to us, determined in every way that the laws existing at the time the contract is made enter into the contract, and become a part of it, and cannot be affected by any subsequent legislation.

In Allen v. Allen, 95 Cal. 184, 196, the court, having then before it a question as to whether suit was barred by the statute of limitations of this state, and the fact being that the loan had been effected in the state of New York, and an absolute deed to real property in California given to secure the payment of it, and the suit being brought here in California, said:

> "In the solution of the question presented as to the effect of the deed, we must read as a part of the contract, the laws of this state existing at the time the contract was made * * * ; although the nature and the construction of the contract of loan, which was made in New York, are determined by the latter state."

Further along, on page 197, they show that at the time this conveyance was made, a deed, absolute in form, to real property situated in this state, though intended as a mortgage, transferred the legal title, and there was left in the person executing it a mere equity of redemption, and whenever the debt to secure which the deed was made became barred by the statute of limitations, the right to redeem was barred.

In Savings Bank of San Diego v. Barrett, 1[illegible] 413, 417, the court said:

> "The amendment of section 702 of the Code of Civil Procedure in 1895 [Stats. 1895, p. 226], extending the time for redemption from sales under execution to one year, has no application to sales under the foreclosure of a mortgage executed prior to the enactment of this statute."
>
> Citing Barnitz v. Beverly.

In Benson v. Bunting, 127 Cal. 532, 534, the court said:

> "In 1892, when the mortgage was executed, the statute provided that redemption might be made at any time 'within six months after the sale.' [Code Civ. Proc., sec. 702.] This section was amended February 26, 1897, by extending the time for redemption to 'twelve months,' the amendment to take immediate effect; and in the second count it was alleged, in substance, that all the parties understood and agreed that said amendment, which was passed and took effect before the decree was entered in the foreclosure case, controlled, and that under it the time for redemption was extended to twelve months. It is conceded by plaintiffs that the statutory time within which redemption must be effected is fixed by the statute in force at the time the mortgage is executed, and not by one subsequently enacted, and that, under the statute, they should have redeemed within six months from the date of the sale."

In Malone v. Roy, 134 Cal. 344, after saying that at the time the mortgage was executed, the statute gave the judgment debtor six months within which to re-

deem, and referring to the change made by the act of February 26, 1897, in section 702 of the Code of Civil Procedure, and after saying that the only question is which statute governs, they held that it was the statute existing at the time that the mortgage was given, and cited Haynes v. Tredway, and Barnitz v. Beverly as quite sufficient authority upon that subject.

Now, in Haynes v. Tredway, 133 Cal. 400, this court had under consideration this question, and gave more attention to it than has been thought necessary since that decision or before, until the present case.

There the attempt was made to distinguish this Tredway case on this ground, that the purchaser at the foreclosure sale, and who was also the mortgagee, bid in the property at an amount in excess of his entire claim against the defendant. It was claimed that for that reason he had certainly got all that he was entitled to under his mortgage contract. The Supreme Court not only held that it was the statute in existence at the time the mortgage was executed, and not that in existence at the time of the sale, that controlled, and that the supposed distinction arising out of the question of whether a greater or less amount than that due was bid for the property was of no effect, they used such language in the opinion as shows that there can be no possible question of the ground upon which that case was proceeding, and therefore an index to all the other cases, even though they may not be so explicit in their statement of the principle. Said the Supreme Court [133 Cal. p. 402]:

> "It is thus conceded that if plaintiff had been a purchaser for a less amount, the statute as

amended allowing the mortgagors twelve months to redeem would have been, as to him, unconstitutional, *because impairing the obligation of his mortgage contract*; but it is asserted that by reason of the fact that the purchaser's price exceeded the amount of his claim in full, the obligation of the *mortgage contract* was in no sense impaired, and therefore the amended statute, as to the purchaser, is constitutional. The court is not prepared to say that the constitutionality of an act can be tested in this way. Indeed, we see no difference in principle, when testing the constitutionality of this act, whether the purchaser bid in the property for an amount less than his claim, or bid a sum in excess of that claim. *By the mortgage contract incorporating therein the statute of redemption existing at the time,* the agreement of the mortgagor was that the purchaser at the foreclosure sale, in case of default, should be entitled to the possession of the property six months after the sale, in case no redemption was had. In another form, it may be said that the agreement of the mortgagor was, that the purchaser at the sale may have title to the property, subject to a right of possession thereafter in the mortgagor for six months. *That was the contract in this case,* and the necessary result of giving the amended statute effect here is to give the mortgagor the right to the possession of the property for twelve months after the sale. It is thus patent upon its face that a statute extending the right of possession in the mortgagor to a period of twelve months is a substantial impairment of the contract limiting the right of possession to six months."

The court, after much more in the opinion, and citing Barnitz v. Beverly, and quoting liberally from it, shows us subsequently what was meant by the learned justice when he said that they did not think that the constitutionality of a statute could be tested that way. The reasons given why it could not be so tested will be found at pages 403-404, and they are substantially that the constitutionality of a statute with reference to some particular contract is to be tested by looking at the statute itself, and the contract, the obligations of which are supposed to be impaired. And it is either a valid statute and does not impair the obligation of the contract when it is passed, or it never is; and it is invalid and unconstitutional for the reason that it does impair the obligation of the contract when it is passed, or it never can become so. Therefore, whether the statute is or is not constitutional with respect to a particular contract, cannot be made to depend upon contingencies which may or may not happen in the future, such as whether, when a judgment is entered and execution, and a sale made, the purchaser shall bid more or less than the contract debt. If it was unconstitutional before he made the bid, it did not become constitutional by reason of the bid.

We submit that the reasoning is as conclusive as the proposition is itself obvious.

In that case also the court said that the defendants rely upon the case of Connecticut Mutual Life Insurance Co. v. Cushman, 108 U. S. 51, and they quoted from Barnitz v. Beverly this clause:

"The case of Conn. Mut. Life Ins. Co., 108 U.

> S. 51, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of payment, nor affect any remedy which the mortgagee had by existing law for the enforcement of his contract."

And Justice Garoutte continuing said:

> "Possibly there is language in the insurance company case which does 'collide' with Barnitz v. Beverly. * * * But if so, the collision only results in injury to the earlier case."

Thus stood the law as interpreted by the Supreme Court of the state of California as well as by this court when this cause arose and was presented to the Supreme Court of California. In none of these decisions, unless in the Connecticut Life Insurance case, is there the slightest intimation that one part of the laws providing for redemption existing at the time the mortgage is made, enter into that mortgage contract and become a part of it, and that other parts of the law do not so enter into it. Of course the question of whether the obligation of the contract is impaired in the sense of the constitutional provision by subsequent legislation may depend upon facts of the particular case, but if it be held that such subsequent legislation does not impair the obligation of the contract, though changing the laws in some respects, it is only because that change does not affect any substantial right existing under the laws at the time the mortgage is made. In other words, the rule never has been that there can be no change in the laws for the

redemption from execution sale made under a decree foreclosing the mortgage, or that any such law will be unconstitutional, but only those which impair the obligation of the contract, and if they do impair it in any degree, they are void.

Now we respectfully submit that an amendment to the law whereby the amount to be paid is increased or diminished, is a law impairing the obligation of the contract. That no distinction can be made between the time of redemption and the amount to be paid for redemption. That is certainly the rule in this state. We have already called attention to the cases upon this subject. Thus in Thresher v. Atchison, 117 Cal. 73, 74, the court say:

> "Cooley, in his treatise on Constitutional Limitations, page 353, says: 'A law is void which extends the time for the redemption of lands sold on execution, or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have the title at the time when provided by the law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for payment of a promissory note.'"
>
> *Id.* 74-75.

That ended the quotation from Cooley, and the court quoted from Freeman on Executions, sec. 315, this clause:

> "But the right of a purchaser to a conveyance, or to repayment at the termination of the period allowed for redemption, is deemed to rest upon

> a contract which the legislature will not be permitted to impair. Hence, while the time for redemption may probably be shortened, it certainly cannot be prolonged by any law enacted after the sale."

That ends the quotation from Mr. Freeman. Then says the court:

> "The same principles which render void an act extending the time for redemption after the sale has been made will render void an act reducing the amount of money required for a redemption from such sale."
>
> 117 Cal. 75.

In Teralta Land etc. Co. v. Shaffer, 116 Cal. 518, already cited, the court held the same thing with respect to redemption of land sold for delinquent taxes. To be sure, in those cases, and especially the tax case, the contract does not exist until the purchaser buys, and the laws for the redemption of property sold for taxes at the time he purchased constitute the law of his contract, and any change in such laws impairs the obligations of the contract.

We are not citing these cases as determining anything as to what the contract of Hooker, the appellant, is. We only say that whatever may be the contract, it is, by the decisions of the Supreme Court of California, determined that the laws for the redemption of property from the sale, existing at the time the contract is made, are a part of the contract, and that any law either extending or shortening the time of redemption, or increasing or diminishing the amount to be paid, is in violation of that contract. If the Supreme

Court of California be correct, then there is nothing left of this case except this question, What was Hooker's contract? Can he invoke the laws as they existed at the time the mortgage was made, or must he show that the laws as they existed at the time he purchased at the sale were subsequently changed to his detriment? Or, in other words, are the redemption laws as they existed when the contract of mortgage was made, a part of Hooker's contract of purchase? Is he in privity with that mortgage contract to the extent that he is protected by its terms, or is his own purchase the contract, and only contract, which he has ever made, and the obligations of which the state cannot impair?

The answer is found in the cases which we have already cited. Either the laws regulating redemption at the time of the mortgage are a part of Hooker's contract or they are not. If they are not, then pray what more reason would he have to complain of the extending of the time after the execution of the mortgage but before his contract of purchase, any more than to complain of the reduction in the amount to be paid? When he bought, the amendment to section 702 had been passed and the time for redemption was fixed for one year. When he purchased, the amount to be paid was the purchase money and interest at one per cent. a month. Nobody denies that if the laws existing at the time the mortgage was made were a part of his contract, a reduction of the amount is prohibited by the constitution of the United States just as much as the extension of the time, and nobody denies that in so far as the subsequent law extended the time of re-

demption, it was in violation of the obligations of the contract of the purchaser, as well as the mortgagee, which purchaser stood as the assignee of the mortgagee and entitled to all the protection that the mortgagee was entitled to. How, then, can it be said that though the plaintiff in error is entitled to the protection of the redemption laws with regard to the time of redemption, yet as to the amount, he is governed by another law, and one passed subsequently to the execution of a mortgage? It never would have been imagined that this amendment to section 702, made after the mortgage contract, would not have been void as to this contract in toto except for a remark in Barnitz v. Beverly, concerning the case of the Connecticut Mutual Life Insurance Company against Cushman, 108 U. S. 50. Mr. Justice Henshaw, in delivering the opinion of the Supreme Court of California in this case puts his decision entirely upon that ground. He says in the opinion [see Trans. pp. 118-119],

> "It is next contended that the redemption was insufficient for the amount, that the law at the time of the making of the mortgage entered into and became a part of the contract; that by that law the redemptioner was required to pay two per cent. per month in addition to the purchase money, while it is an admitted fact in this case that but one per cent. was paid. In brief, it is contended that to permit section 772 of the Code of Civil Procedure as amended in 1879 to operate upon the contract, is to impair its obligation. Herein especial reliance is had upon the case of Barnitz v. Beverly, 163 U. S. 118, which is said to be conclusive upon the question. In the earlier

case of Con. M. L. I. Co. v. Cushman, 108 U. S. 50, that same august tribunal, having under consideration a case identical in principle to the one here in question, wherein the rights of the purchaser were involved, held that a law passed subsequent to the mortgage and reducing the interest to be paid to a purchaser at such sale was operative and did not interfere with the rights of the purchaser whose contract did not exist until the time of the sale, and was governed by the laws in force at such time. Much nice reasoning is indulged in here to show that the principle declared in the Cushman case has been overruled in the later case upon which appellant relies. But upon that question the Supreme Court of the United States has itself spoken in Barnitz v. Beverly, and has said: 'The case of Con. M. L. I. Co. v. Cushman, 108 U. S. 51, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of the payment, nor affect any remedy which the mortgagee had by existing law for the enforcement of his contract.' * * * This determination of the Supreme Court of the United States upon one of its own decisions is, of course, absolutely binding upon this court. The essential distinction seems to be that, if the party complaining of the operation of the law is himself not injured by it, if the obligations of *his* contract are not impaired, he cannot be heard to complain, nor will the law be held as to him to violate any of his rights."

In the opinion as printed in the transcript, and in the passage which we have quoted, there are two mis-

takes. The section of the Code of Civil Procedure should be 702 instead of 722, and as amended in 1897 instead of 1879.

But now we do not deny that if the Connecticut Mutual Life Insurance Company v. Cushman is identical with the case now before the court, and if that case, in so far as it determined this particular question, does not collide with Barnitz v. Beverly, and the principle for which we are here contending, that it doubtless is true that that is the end of the matter. But we submit that in the very passage which we have cited from the pen of the learned justice who delivered the opinion of the Supreme Court of California in this case, there is involved a complete contradiction of terms. We are told there that this court held in the Cushman case, that a law passed subsequent to the mortgage, and reducing the interest to be paid to a purchaser at such sale, was operative, and did not interfere with the rights of the purchaser, *whose contract did not exist* until the time of the sale, and was governed by the laws in force at such time.

Now it is submitted that if this is a correct interpretation of the Cushman case, it is in direct conflict with Barnitz v. Beverly. If the contract of the purchaser does not exist until the time of the sale, and is governed by the laws in force at such time, then why, in Barnitz v. Beverly, and in all the cases decided by the Supreme Court of California, is an extension or abridgment of the time of redemption an impairment of the obligation of the contract? Truly, if the purchaser's contract is that only which consisted in his

buying at the sheriff's sale for a price named, the property sold, and that contract is governed by the laws in force at such time, it seems to us that every term of the law of redemption, time as well as the amount, and every other condition existing at the time of his purchase, is the law which is to be looked to for the obligations of his contract, and to determine whether those obligations are impaired or not. And if that is the law, we say again, that all of these cases in California, and Barnitz v. Beverly, as we understand it, were not decided correctly. But, as we have already said, that case has been uniformly followed in the state of California wherever the question has arisen, regardless of who was the purchaser or for what price he purchased. And all proceed upon the theory, and can have no foundation in any other principle, than that those redemption laws were a part of the mortgage contract. And the alteration of them in any substantial particular is an impairment of the obligations of that contract.

Mr. Justice Henshaw further says:

> "It may be added that since the decision in the case of Tuolumne R. Co. v. Sedgwick, 15 Cal. 515, where this question first arose in this state, and where the same conclusion was reached and expressed as by the United States in the Cushman case, the rule in this state has always been the contrary of that contended for by appellant."
>
> Trans. p. 119.

We do not conceive that what the law of this state has been from any point of time upon this subject can have any effect upon the determination of this cause in

this court, except that effect which arises from the respect due, and always accorded by this court, as well as other appellate courts, to the decisions of tribunals of last resort, though those decisions may not have the force of authority upon them. And while no doubt that respect will be given to the decisions of the Supreme Court of California, not merely through courtesy, but because its decisions are justly entitled to respect. Yet nevertheless it is not infallible, and it is respectfully submitted that Mr. Justice Henshaw made a mistake in saying that the decisions of the California court have, since the Tuolumne Redemption Company's case referred to, always been to the contrary of that contended for by us. If we look into the history of the adjudications upon the principles here involved, in the Supreme Court of California, we find that that history has not been unlike the progress of judicial investigation in other states. When these questions first arose in the United States there was a strong inclination to the proposition that redemption laws were not part of the contract but they pertained rather to the remedies for the enforcement of contracts, and that notwithstanding the provisions of the federal constitution, the power of the states over merely remedial regulations was almost unlimited. It was always conceded that to deny all remedy when one had previously existed, did impair the obligation of the contract, but so long as *a* remedy was provided, its comparative efficiency with those provided at some other time were not matters of any importance in the determination of questions like the present.

In Thorne v. City of San Francisco *et al.*, 4 Cal. 127, this question of the relation of laws for executing judgments, including the redemption laws, first came before the Supreme Court of California, and Mr. Justice Wells, in delivering the opinion of the court said:

> "Primarily, two propositions are advanced. The first is: That the Redemption Act, as it is called, does not apply to this case, for the reason that by the rule of construing statutes, it was intended by the law-making power that it should have a prospective, and not a retrospective effect; and for the further reason, that if it was designed to have a retrospective action, then the law is in contravention of that clause of the constitution of the United States which prohibits the several states from passing laws impairing the obligations of contracts."
>
> 4 Cal. 131-132.

These questions are then taken up in their order. And their conclusion is that as to the first question, that it should not be given a retrospective operation.

4 Cal. 131-139.

In taking up the second question, Mr. Justice Wells said:

> "It is contended that the proposition as to retrospective operations of statutes depends upon the constitutional question, and that they must stand or fall together; that the last supports the first, and that the only objection to a retrospective law is, that it impairs the obligations of contracts."

But said he:

> "We think there is a broad difference in the

> two propositions, and being satisfied that our conclusions are correct in regard to the first, we proceed to the second, involving the constitutionality of the law."

In that case the suit on which judgment has been obtained, and under which the respondent's purchase was commenced and proceedings taken, was before the statute providing for redemption took effect, and therefore, thought the learned justice, the right of an absolute sale became vested. And then he said:

> "We would rest here, but that arguments have been urged most strenuously upon the constitutional point. Upon that branch of the subject we are relieved from whatever doubt we may have entertained, not only by our own deliberate consideration of the subject, and the impregnable position of the U. S. Supreme Court in Bronson v. Kinzie, 1 How., but by the confirmation of the doctrine by the same high tribunal in McCracken v. Hayward, 2 How., upon full review."
>
> 4 Cal. 129, 140.

The court then proceed to consider this question, and they declare that the distinction attempted to be made between the obligation and the remedy, was against the principle held in the cases cited. And they said, moreover, that in those cases the view presented is that there might be alterations of the remedy, providing they did not seriously impair it. "Such an admission," says Chancellor Kent, "is dangerous from its liability to misconstruction and abuse."

And then, applying the doctrines to the particular case, they said that by the change of the law, the right

of absolute sale is taken away, and the provision substituted which not only hinders and delays him in recovering his money, but renders him insecure in the hope of it, and might, in many instances, totally destroy his rights by nullifying them.

The result of Thorne's case is that the court there, is in entire accord with this court upon the proposition that redemption laws are a part of the contract, and that if the statute is silent as to redemption, no right of redemption exists, and the fact that it does not exist is a part and parcel of the contract which the legislature cannot change.

This case was approved in Seale v. Mitchell, 5 Cal. 401, 402. It was doubted in Hart v. Burnett, 15 Cal. 530, 587, and overruled by the Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515. And the dissenting opinion of Justice Heydenfeldt in Thorne's case was adopted.

In Moore v. Martin, 38 Cal. 428, 439, and the last clause in this opinion of Moore v. Martin is:

> "Besides, we regard the case of Tuolumne Redemption Company [15 Cal. 515] as overruling the case of Thorne v. The City of San Francisco [4 Cal. 127]."

But in Allen v. Allen, 95 Cal. 184, 205, already cited, the majority of the court held that the right to redeem mortgaged premises was fixed by the law existing in this state at the date of the contract, and could not be affected by subsequent legislation.

In Allen v. Allen, 95 Cal., page 184, the leading opinion was delivered by Justice Paterson, and in his

opinion occurs that which we have quoted, and holding that the law as it existed at the time the deed was made must be read as a part of the contract.

95 Cal. 196-200.

And he distinguished

Oullahan v. Sweeney, 79 Cal. 357,

because in that case the right of redemption was not absolutely extended, but the purchaser was required to do certain things before he could take out a deed. And the right of redemption might thus continue beyond the year by his failure to give the notice prescribed. From his opinion the Honorable Chief Justice dissented. And in the course of his dissenting opinion, and after citing Oullahan v. Sweeney, Chief Justice Beatty said:

> "It is impossible to distinguish that case from this; and if it was correctly decided, there can be no doubt of the power of the legislature to extend the right of a mortgagor to redeem."
>
> 95 Cal. 205.

He subsequently said, on the same page:

> "A decision on this point by the Supreme Court of the United States would of course be binding authority, as the immunity asserted arises under the constitution of the United States; but no such decision has been cited."

Teralta, etc., Co. v. Shaffer, 116 Cal. 523, and the other cases which we have already cited, decided by the Supreme Court of California, will, we think, establish the proposition that the opinions of the Supreme Court of this state have fluctuated upon this

subject, and that subsequently to Allen v. Allen it was said that this decision of this court, which would be a binding authority, ha[illegible]een given, and the case cited was Barnitz v. Bever[illegible].

Now what we especially desire to call attention to here is this fact: that in all the cases in California prior to Hooker v. Burr, there never was one word said that indicated that in the mind of the Supreme Court of California there was any difference between extending or abridging the time of redemption, and increasing or diminishing the amount to be paid on redemption. The discussions in the court of California have been upon the broad question of whether redemption laws were part of the contract, and when the court was of the opinion that they were, as in the 4th California case, they did not say that the time of redemption might not be altered, and that the amount to be paid was subject to legislative determination without regard to whether contracts were prior or subsequent to such legislation, but it was that the redemption laws were part of the contract; and when the court had come to a different conclusion, and in the Tuolumne case in the 15th California Reports, it will be seen by examining the opinion that it never entered into the mind of the court in that case that there was any difference between the two things. They simply reached the conclusion that the contract was the contract made by the purchaser at the time of the sale. In that case they distinctly held that a repeal of a right of redemption, in other words, an act making sale absolute instead of conditional, would not impair

the contract. A debtor in default has no vested right to have his property sold in any particular way, and third persons not parties to the contract have no vested right to purchase the property of a common debtor sold at the instance of another creditor.

> "Whatever rights of the kind exist, pertain solely to the remedy, and exist solely by statute, and the legislature may repeal them at any time before they have been availed of by the parties entitled. To state the proposition in different form: the legislature has no right to alter the terms of a contract already in existence; it has a right to alter the remedy."
>
> 15 Cal. 524.

In Thresher v. Atchison, 117 Cal. 73, which we have before cited, it is there declared emphatically that the legislature was as powerless to diminish the amount which he should receive as redemption from the sale, as to extend the time at which he should be entitled to a conveyance, and take possession of the land. It could, with as much right, authorize a redemption without requiring any payment beyond the amount of the purchase, as it could reduce the amount then required to be paid.

117 Cal., 75-76.

And it is submitted that if there be any distinction between that part of the redemption law which fixes the amount to be paid, and the part which fixes the time within which it is to be paid on redemption, so that laws affecting the amount do not impair the obligation of the contract, while those that affect the time do, such distinction is not made in the California cases, and the

decisions of that court previous to this are not against us.

Now in the opinion in Barnitz v. Beverly, if we leave out that language by which the Cushman case was distinguished, and upon which turns the decision of the Supreme Court of California in this present case, there are many passages which, it seems to us, do collide with the Cushman case. We call attention to the following:

> "The decisions of this court are numerous in which it has been held that the laws which prescribe the mode *of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States.* But it will be sufficient for our present purpose to mention a few only."

Again:

> "It is the plaintiff's absolute and undoubted right under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay."

Again:

> "When this contract was made, no statute had been passed by the state changing the rules of

law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court, and it must therefore be governed, and the rights of the parties under it measured, by the rules as above stated. They were the laws of Illinois at the time, and therefore entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed."

41 L. Ed. p. 98.

Again:

After referring to the rights of the parties under the law as they existed at the time of making the contract, and quoting from McCracken v. Hayward, this court said:

"Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff."

Id. p. 99.

On the same page this court refers to the opinion of Mr. Justice Miller in Brine v. Hartford F. Ins. Co., 96 U. S. 627, wherein it was held that *all the laws of a state existing at the time a mortgage or any other contract is made*, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory upon all courts which assume to give a remedy on such contracts—that the construction, validity and effect of contracts are governed by the law of the place where they are made, and are to be performed, if that be the same—that it is therefore said that these laws enter into and become a part of the contract.

Again:

> "At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the constitution of the United States."
>
> *Id.* p. 100.

Now these passages seem to us to admit of but one interpretation, the laws existing at the date of the contract and all the laws, including the redemption laws, are part of the contract. And they cannot be altered in any substantial particular, because it is an impairment of the obligation of that contract.

In the Cushman case itself is contained an expression which, it is submitted, is not easily reconcilable

with the decision in that case. The part of the opinion referred to is as follows:

> "The statute in force when the mortgage was executed prescribed the rate of interest which the amount paid or bid by the purchaser should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage."
>
> 27 L. Ed. 653.

If the proposition here inserted should be accepted as the final statement of the law, and if the mortgagor could object to an increase in the rate, upon what ground could he object? Certainly no other than that the rate fixed by the law as it existed at the time he entered into the contract was a part, at least, of his contract, and its obligation could not be impaired. If, then, there is one law for the mortgagor and the mortgagee, and another for the purchaser, we should have some strange results under the law in this state. Section 701 of the Code of Civil Procedure is as follows:

> "Sec. 701. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons, or their successors in interest:
>
> "1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

"2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

Section 702 we have already copied.

Section 703, so far as necessary to the present illustration, declares:

"If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent. thereon in addition, and the amounts of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. * * * If the judgment debtor redeem, *he must make the same payments as are required* to effect a re-

demption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate."

One redemptioner may redeem eleven months and a half after the sale. And between that time and the end of the twelve months there may be a half dozen more redemptioners, and finally the judgment debtor may, within twelve months, redeem also, but he must make the same payments as are required of a redemptioner. But if so in the case supposed, he must pay two per cent. not only on the purchase price, but upon all these redemption additions, although those redemptions may have been, the first of them, not more than two weeks before the time he redeems. Now, according to the suggestion in Cushman's case, that increase of the burden on the judgment debtor might take place unless, as there suggested, the law should be held unconstitutional as to him.

It is true that under the law as it stood before, the burden was quite as onerous as it is under the new law, but we spoke only of what may happen under the power of the state, if this distinction exists. A redemptioner may be required to pay what he never can get back from the judgment debtor, because the law existing at the time of the contract is a part of the mortgagor's contract, and not a part of the purchaser's contract.

7. A law either reducing or increasing the amount to be paid for redemption, after the execution of the mortgage contract, does substantially impair the obligation of the contract.

It seems to us that this proposition is quite obvious. The remarks under the last caption, we think, sufficiently show that if the power of the legislature exists to make the change at all, that power must be unlimited. As was said in Barnitz v. Beverly, and in the cases cited therein, especially McCracken v. Hayward, that a subsequent law which superadds a condition that there should be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, affects the obligation of the contract. That this power in a state legislature, if it exists at all, may be carried to any extent, may prohibit a sale for less than the whole appraised value, or for three-quarters, etc. So we say here, if the legislature can reduce the amount of interest to be paid to effect a redemption fifty per cent., it can reduce it a hundred per cent. And if it can declare that a redemption may be made by paying the purchase money without any interest at all, it is not easy to see why they could not equally have said that such redemption may be made by paying ninety per cent. of the purchase money. If we are to look to those laws only which exist at the date that the sale is made, for the purpose of ascertaining the obligations of the purchaser's contract, and he purchases with such a law as just suggested before him as that by which the measure of the obligations of his contract is to be taken, how could it be said that the

obligations of that contract are any more impaired by such legislation subsequent to the mortgage but before the sale, than in the Cushman case? With such a law we know there would simply be no purchasers. If any at all, the mortgagee alone. And in that event, the act would do no more than to say that the mortgage debt might be discounted by the debtor alone, and paid with ninety cents on the dollar.

If we are correct in this, is not the obligation of the contract impaired by such alteration of the remedy under any of the decisions which we have cited? The obligation of the debtor's contract was to pay his creditor so much in money; the creditor had the right to put up the mortgaged property for sale for money, the thing in which his debt was agreed to be discharged. He is not compelled to accept the property in lieu of money, but he has the right to convert it into money, and pay the proceeds upon his mortgage debt. Now, if the legislature had said that if a mortgage debt should not be paid within such time after the decree of foreclosure, that then the mortgagee should take the property, nobody would doubt that such a law impaired the obligation of the contract. We are, of course, assuming that at the time the mortgage was made the law was different. What is the difference between doing this directly and accomplishing the same thing indirectly? Why not say that the property should not be sold at all, just as well as to clog that sale with such conditions, and create in others such rights as against the purchaser as would make it impossible that there should be a purchaser other than

the mortgagee, and that the mortgagee himself would take the property only because he must do so or lose his debt entirely? We submit that such laws do affect the obligations of the contract, and in a substantial and material manner.

8. The delivery of Clark & Bryan's check to the sheriff of Los Angeles county, for the sum of one thousand and seventy dollars, was no redemption, if the amount was sufficient.

The statutes of this state on the subject of execution sales clearly show that by a purchase the purchaser acquires an interest in the land purchased.

Section 700 of the Code of Civil Procedure declares that

> "Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:
>
> "1. A particular description of the real property sold;
>
> "2. The price bid for each distinct lot or parcel;
>
> "3. The whole price paid.
>
> "4. When subject to redemption, it must be so stated.
>
> "And when the judgment under which the sale

has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency, in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county."

Section 706 declares:

"Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property * * * on the application of the purchaser or the judgment creditor."

Section 707:

"The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof."

These provisions show that the purchaser does, in advance of the execution of a deed, acquire an interest in the real estate, and it is property of which, it is submitted, that he cannot be divested without due process of law. A redemption, to be sure, may be made, but it must be made in the manner prescribed by the statute, and the statute everywhere clearly indicates that a redemption is to be made in money, and not in anything else. The judgment in this case was made payable in a specified kind of money. Now the check in this case was not payable in gold coin. But if it had been, it would have been no better, for the re-

demption, when made by a payment to the sheriff, cannot be made by a check at all. Of course if the redemption is made directly with the purchaser, he may accept whatsoever he pleases, but the right of redemption is purely a creature of the statute, and a redemptioner must come strictly within the provisions of the statute and show a strict compliance with it.

Haskell v. Manlove, 14 Cal. 57;
Wilcoxson v. Miller, 49 Cal. 194.

As already said, our statute requires the redemption to be made in money, and the sheriff has no authority to receive a check. The very terms employed by the statute show this to be the case.

In order to effect a redemption, the judgment debtor or redemptioner must, within the time mentioned after the sale, pay the purchaser the amount of his purchase, etc.

C. C. P., Sec. 702.

And if the property be redeemed by a redemptioner, another redemptioner may, within sixty days, redeem on *paying* the sum *paid* on said last redemption, etc.

C. C. P., Sec. 703.

But a check is not a payment.

3 Freeman on Executions, 3rd ed., Sec. 320.

In this section, and on page 1880 of the volume, he says:

> "Redemption must be made in money. It may, in the absence of statutes to the contrary, be made in greenbacks, or any other legal tender. It cannot be made in ordinary nor in certified bank checks, nor in certificates of deposit. But if the

officer to whom redemption is required to be made receives the notes of national banks, treats and receipts for them as money, and holds himself ready to pay, and offers to pay, the amount thereof in lawful legal tender, it has been held that the redemption is good. Such officer is deemed to be so far the agent of the person from whom redemption is sought to be made, that he may waive the latter's right to object to a tender or payment by the redemptioner, part of which is in national bank notes, or paper currency. Redemption might formerly, in New York, be made in current bank bills. The purchaser may, however, accept redemption in any mode of payment satisfactory to him. If the sum paid is too little, the redemption is void, unless the deficiency is too trifling to be worthy of consideration, or the sum paid is accepted by the holder of the certificate of purchase without objection. * * * A *tender* in bank notes is good, if not objected to on that account."

But a check is not a payment, even in the ordinary transactions between a debtor and creditor unless it is expressly so agreed.

Dingley v. McDonald, 124 Cal. 90.

Neither is the taking of a promissory note a payment of a debt, or redemption of the amount of the debt.

London & San Francisco Bank v. Parrott, 125 Cal. 417;

Dellapiazza v. Foley, 112 Cal. 380;

Equitable Nat. Bank v. Griffin & Skelley Co., 113 Cal. 692.

But while the purchaser may accept redemption in any mode of payment that is satisfactory to him, the sheriff has no such authority. He is not the agent of the purchaser to do anything or to receive anything or to accept redemption at all, but he is an officer of the law, to whom the payment may be made to effect the redemption, but he has no authority except that which is prescribed by the statute, nor can he accept anything in payment or any mode of payment except what the statute particularly authorizes.

3 Freeman on Executions, Secs. 319-320;
Bennett v. Wilson, 122 Cal. 509, 516;
Thorne v. San Francisco, 4 Cal. 127.

In this case it was directly decided that the sheriff had no authority to receive a check in payment of the amount necessary to effect redemption; and that checks are not payment in ordinary transactions. See further:

Larson v. Breene, 21 Pac. 498;
Beauchamp v. Archer, 58 Cal. 431, 434-435;
Villhac v. Biven, 28 Cal. 409.

And the deposit of a check in court is not sufficient.

Louis v. Lawson, 45 Wis. 353.

Nor does the fact that the party has money in the bank, set apart to meet it, make any difference.

Meyers v. Bymington, 34 Ia. 205;
Te Poel v. Shutt, 78 N. W. 288.

And that a bank certificate of deposit is not available to redeem land sold on execution.

Dougherty v. Hughes, 3 Ia. 92.

Nor is a partial compliance with the redemption laws, of any effect. They must be complied with fully and strictly.

Keeley v. Sanders, 99 U. S. 441;
Parker v. Dacres, 130 U. S. 43.

And in the case of Bennett v. Wilson, 122 Cal. 509, 516, the supreme court of California expressly decided that the sheriff was not made the agent of the purchaser so far as to bind the purchaser by the payment made to the sheriff. That he is authorized to receive the money of a redemptioner or a purchaser from a previous redemptioner, but that the statute did not make the sheriff such an agent as that by receiving the money it would necessarily bind the purchaser or previous redemptioner to accept it.

It will be noticed that in this particular case there were other objections to this check. It was not drawn by Rhodes, the redemptioner, at all, but by Clark & Bryan, and payable to the order of the sheriff.

Now we do not claim that the use of a check in making a redemption does necessarily make the redemption void. That a check may be used as the means of passing money into the hands of the sheriff we do not deny. It does not make any difference by what means the money is paid into the hands of the sheriff. To go to the bank with the redemptioner, there receive a check from him, place it in the bank and receive the money upon it himself, would, of course, effect a redemption. But what we contend for is that a check is not a payment, and that in this case, the check was delivered to the sheriff and held by him

for nearly eleven months. If the check was not a payment, isn't it obvious that no payment was made to the sheriff himself until the time for redemption had expired by nearly a year?

There was no tender of the money to plaintiff. The evidence shows exactly what was done. Mr. Hooker's testimony will be found at pages 32 to 34 of the transcript.

The money was never tendered to him, nor was he ever informed that it had been tendered to his attorney. The attorney of Mr. Hooker was given to understand that the money was in the sheriff's office, but the money was never offered to him. In fact the money was not in the sheriff's office at that time.

But besides that, the admitted facts in the case show that there was no tender of the money, because the sheriff himself didn't have it. Clark did not have it when he called on the sheriff. [Rec. p. 185-187.] The statutes of this state have provided the manner in which a tender may be made, and by which the obligation may be extinguished. In the Civil Code of California it is provided that an obligation is extinguished by an offer of performance made in conformity to the rules herein prescribed, and with intent to extinguish the obligation.

Civil Code, Sec. 1485.

And in section 1502 it is provided that the title to a thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect.

And in section 1500 it is provided that an obligation

for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited *in the name of the creditor* with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor.

In the Code of Civil Procedure, section 1030, it is provided that when, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

And in section 2074, C. C. P., an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

In this case it is observable:

1. The money was never, within the time of redemption, paid to the sheriff.

2. The money was never tendered to the plaintiff in this action at all.

3. There was never any offer in writing, to pay him the money.

4. There is no plea in this case on the part of the sheriff, nor any defendant, of a tender of the money to the plaintiff, nor is any tender kept good in the pleadings. For ought that appears, the money is in the custody of the sheriff to this day, and

never has been paid to the plaintiff, nor offered in writing, nor deposited in any bank, nor deposited in court, for the plaintiff.

Upon what principle, then, can it be said that any redemption has been effected? And how was the plaintiff in error divested of the estate in this land acquired by his purchase? It is submitted that in this case, and under this judgment, the plaintiff is declared to have been divested of his property without any compensation or any process of law.

Perhaps a word of explanation should be made here of the cause of making both the sheriff who made the sale and his successor parties defendant in this suit.

Under an act to establish a uniform system of county and township governments, approved April 1, 1897, statutes of 1897, page 452, it is provided in the 103rd section, found in the said statutes, page 481:

> "When any process remains with the sheriff unexecuted in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office; and when the sheriff sells real estate under and by virtue of an execution or order of court, he *or his successors in office* shall execute and deliver to the purchaser or purchasers all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale."

As the statute provided that either the sheriff who sold, or his successor, could make the deed, we deemed it prudent to tender the money for the deed to each of them, and upon their refusal to execute it, to make both parties to the suit.

Respectfully submitted,

J. S. CHAPMAN,

Attorney for the Plaintiff in Error.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 263.

John D. Hooker,
Plaintiff in Error,

vs.

John Burr, A. W. Rhodes and W. A. Hammel,
Defendants in Error.

CLOSING BRIEF FOR THE PLAINTIFF IN ERROR.

I.

The Court has jurisdiction of this writ.

The proposition that the judgment in this case might have passed upon some other ground than the federal question, is not supported by the transcript, nor is the rule such as is contended for by defendants in error.

When a decision of the state court is on a ground broad enough to sustain the judgment irrespective of the federal question, the supreme court will not take jurisdiction, although the federal question involved may have been decided erroneously.

Hale v. Akers, 132 U. S. 554.

Nor when the decision of the federal question was unnecessary and not decided.

Henderson Bridge Co. v. City of Henderson, 141 U. S. 688.

Where federal question not properly raised, and judgment of the state court proceeded upon an independent ground not involving a federal question, the writ of error to the state court will be dismissed.

Haley v. Breeze, 144 U. S. 132.

When judgment of state court is based on non-federal grounds sufficient to support it.

Hale v. Lewis, 181 U. S. 474.

Nor where record shows a federal and non-federal question in state court, and the case was disposed of below on the latter.

Adams County v. Burlington etc. R. R., 112 U. S. 128.

Where the case is disposed of in the state court before the federal question presented by the

pleadings was reached, and it was not necessary to decide that question.

Crossly v. New Orleans, 108 U. S. 106.

Nor if the judgment of the state court may have been given on grounds which the twenty-fifth section of the judiciary act does not make a cause for error, as well as upon some ground which does come within that section.

Steines v. Franklin County, 14 Wall. 15-23.

To give the supreme court jurisdiction on error to a state court, it must appear in the record that some one of the questions stated in the twenty-fifth section of the judiciary act arose and was applied by the state court in disposing of the controversy.

Id.

These principles are established by innumerable authorities, but no authority goes to the extent of holding that when the opinion of the supreme court of the state is before this court, and the grounds of its decision are apparent, that this court will decline jurisdiction because, forsooth, there were some questions of state law regulating the practice in the state courts, upon which the state court might have made a decision independently of any federal question, though sufficient to sustain the judgment regardless of the federal question, when the record does not disclose that the state tribunal made any such de-

cision. In this case the whole effort of the defendant in error is to show that there were some questions of state law regulating the procedure in the state courts upon which that tribunal might have given a decision, which would have disposed of the case independently of a federal question. But the answer is, the court didn't give any such decision, and besides that, by the very decision which it does give, it shows that those same questions of procedure, every one of which was raised in that court, was decided to the contrary of what is claimed here. If such a doctrine as is contended for in the brief of defendant in error were admissible, there never could be any judgment of a state court reviewable here, since it is always conceivable that some question of state practice might have been decided in such manner as to have terminated the case without any decision upon the merits.

But in our case the opinion of the supreme court of California is before this court as a part of the record, and is to be looked to for the purpose of ascertaining what is decided by that court.

Cousin v. Labatut, 19 How. 202; 15 L. Ed. 601;

Murdock v. Mayor etc. of Memphis, 20 Wall. 633; 22 L. Ed. 429, 443;

Gross v. U. S. Mtg. Co., 108 U. S. 485; 27 L. Ed. 795;

Philadelphia Fire Association v. New York, 119 U. S. 116; 30 L. Ed. 346;
Scudder v. Coler, 175 U. S. 36; 44 L. Ed. 62.

It is sufficient that it appears on the face of the record that a federal question was raised for the decision of the court, and that the judicial mind of the court was exercised upon it, and their decision was against the right claimed under it.

Maxwell v. Newbold, 18 How. 515; 15 L. Ed. 506-508;
Sully v. American Nat. Bank, 178 U. S. 289; 44 L. Ed. 1072;
Gross v. U. S. Mtg. Co., 108 U. S., *supra.*

The federal question here is sufficiently raised in this record.

Sayward v. Denny, 158 U. S. 180; 39 L. Ed. 941.

In this latter case the court considered the manner in which the question must be raised, and among other things, said:

> "The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed.
>
> "7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from

> the record before the state court can be held to have disposed of such federal question by its decision."

See also

Dewey v. Des Moines, 43 L. Ed. 665.

In San Jose Land & Water Co. v. San José Ranch Co., 189 U. S. 177; 47 L. Ed. 765, 768, this court said:

> "While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff in error."

And a number of cases are cited in support of that proposition.

In this case, that the question was necessarily involved, does appear from the record. In the complaint the date at which the note and mortgage were given under which the sale was made, is stated, and it is not denied by the answer. The date of the sale under the foreclosure decree is given, and it is not denied.

The federal courts take judicial notice of the public laws of the several states.

Leland v. Wilkinson, 6 Pet. 317; 8 L. Ed. 412;

Owings v. Hull, 9 Pet. 607; 9 L. Ed. 246;

Gormley v. Bunyan, 136 U. S. 635; 34 L. Ed. 1086;

Elwood v. Flannigan, 104 U. S. 568; 26 L. Ed. 842.

The court, therefore, does know judicially that on the date when this mortgage was given, the time of redemption was six months, and the amount to be paid the purchase price and two per cent. a month; and at the time of this sale the time of redemption had been extended to one year, and the amount reduced to one per cent. a month. It does know, by the allegations of the complaint, and not denied in the answer, the precise amount paid by the redemptioner, and that it was redeemed at the rate of one per cent. a month. And the question necessarily arises upon these facts, as to whether the act changing the law of redemption passed subsequently to the execution of the note and mortgage, impaired the obligation of the contract.

Moreover, it is shown by the record that that question was brought to the attention of the state court, considered by it, and decided against the plaintiff in error.

But it is said that it has been decided once before by this court in the case of the Connecticut Mutual Life Insurance Company against Cushman, 108 U. S., p. 50; 27 L. Ed. 648. A sufficient answer to it is that that case did not decide the question at all, nor arise under any law of the state of California, and the question raised here has never been decided.

Moreover, the case of Barnitz v. Beverly has been decided since the Cushman case, and held distinctly that the law existing at the time when the mortgage is made providing for redemption from a sale under decree of foreclosure, is a part of the contract. And it is submitted that no reason is conceivable why a law changing the time of redemption impairs the obligation of that contract, but that a law changing the amount to be paid does not impair it.

II.

If the questions of state practice presented in the brief of counsel for defendants in error can be considered by this Court, there is not one of them that possesses any merit whatever.

As we have said before, the same questions were made in the supreme court of California, and are manifestly decided against the defendants in error, for the court did consider those

questions, notwithstanding the insistence of counsel that it ought not to have done so. It is said that the plea of the judgment under which this foreclosure sale was made, is not sufficient. To prove this, some decisions are cited.

We answer:

1. Both parties are claiming under the judgment and the execution sale. From that sale defendant in error redeemed, and the sheriff executed a deed to him, claiming that it was in pursuance of the said sale. He cannot question the validity of the judgment.

Cornwall v. Davis, 4 L. R. A. 563;
Lewis v. Watson, 22 L. R. A. 297;
Ellis v. White, 61 Ia. 644;
Pool v. Breese, 114 Ill. 594;
Test v. Larch, 76 Ind. 452.

These are all to the effect that one who has successfully set up a judgment to defeat objections made to his discharge in bankruptcy, cannot afterwards question it. That the purchaser at a sheriff's sale cannot, while relying on the title so acquired, impeach the title of the judgment debtor to prevent his recovering the land in ejectment.

That one who accepts damages under condemnation proceedings, cannot dispute the validity of the proceedings.

Of this character are the two last cases cited.

But it is a general rule that the party accepting the benefit of a judgment is estopped to deny its validity.

Pyle v. Yellowhead, 80 Ill. 208;
Sherman v. McKeon, 38 N. Y., 266, 274-275;
Hazel v. Lyden, 32 Pac. 898;
Bryan v. Pinney, 31 Pac. 548.

2. No objection of this character was taken in the court below, and it is not true that one can object in the supreme court of California for the first time, in all cases, that a complaint does not state facts sufficient to constitute a cause of action.

Cushing v. Pyres, 124 Cal. 663, 665.

This objection, technical as it is, if it have any ground upon which to rest, is just one of that character.

3. It is alleged in the complaint in this action, that an execution was duly issued out of the said court on the 16th of May, 1898, and that the sheriff did, under that execution, duly sell the said property.

Trans. p. 2, par. V of the complaint.

This is not denied. Not only not denied, but they do deny that the deed executed by Hammel, the sheriff, to Rhodes under that execution sale was made without right or authority.

Trans. top page 23, margin 40, par. V.

In the affirmative defense, they set up that after the transfer of the judgment to Rhodes, he was unable to find any property, and there was no property out of which the judgment could be satisfied except the property included in said deed of conveyance, and as said property mentioned in the complaint had been sold under the mortgage foreclosure, redemption thereof was the only manner in which he could recover his said debt.

Trans. p. 26, marginal page 46, par. VIII.

The averments that the execution was duly issued, and the sale duly made, and the certificate of sale duly issued, are sufficient allegations, and especially after judgment.

Hill v. Haskins, 51 Cal. 175.

4. The direct, specific averments of the complaint are sufficient without the aid of inferential allegations.

Weller v. Dickson, 93 Cal. 108, 110.

This case distinguishes the case of Young against Wright, 52 Cal. 407, which involves a plea of a judgment of the justice court, and under the common law in pleading a judgment of a court of inferior jurisdiction, it was necessary to allege the facts conferring jurisdiction. And the court held in that case that he who would avail himself of the different manner of pleading the judgment provided by the code, must bring

himself strictly within the code. But this is not so with courts of general jurisdiction, where it never was necessary to aver the jurisdictional facts.

See also:

Rowe v. Blake, 112 Cal. 637, 644;
Clark v. Nordholt, 121 Cal. 26, 28;
Ashton v. Heydenfeldt, 124 Cal. 14, 18.

5. The allegation that the judgment was duly rendered is not objectionable.

The most that could be said of it is that the term is simply ambiguous. But this objection could only be made by a special demurrer. The term *rendered* is frequently used in a sense which manifestly means a completed and final judgment. It is so used C. C. P., Sec. 669, where it is provided that if a party due after a verdict or decision on an issue of fact, and before judgment, the court may nevertheless "render" judgment thereon.

In the case of Weller v. Dickson, *supra,* in the syllabus it is said that a complaint in an action based upon a judgment *rendered* by a court of general jurisdiction, which alleges that the plaintiff recover a judgment from such court, etc.

So in Lawrence v. Martin, 22 Cal. 173, the language of the syllabus is: "A judgment *rendered* upon an unassignable cause of action for a tort is a debt."

In Wallace v. Eldredge, 27 Cal. 498, will be found the same use of the word in the syllabus, and also in the opinion.

27 Cal. 499.

See also

Page 500.

In Beans v. Manuelli and others, 36 Cal. 117, the syllabus is that in pleading a judgment of the probate court, it is not necessary to allege the facts conferring jurisdiction, but the judgment may be stated to have been duly *rendered*.

See also

Crim v. Kessing, 89 Cal. 478;
Hill v. Sherwood, 33 Cal. 474;
Brewster v. Hartley, 37 Cal. 15;
Carpentier v. Thurston, 30 Cal. 123, 125-126;
McCray v. Harazthy, 51 Cal. 146;
Foley v. Foley, 120 Cal. 33;
Painter v. Painter, 113 Cal. 371;
Holt v. Holt, 107 Cal. 258;
Edwards v. Hellings, 103 Cal. 204, 205, 206.

It is unnecessary to multiply authorities to show how frequently the term *rendered* is used as the equivalent of *recovered* a judgment, and used in the codes of California, and in the opinions of judges. See

San Joaquin L. & W. Co. v. West, 99 Cal. 345,

as to when the decision is given.

And the same matter is considered

In re Cook, 72 Cal. 220, 224-230;

Wood v. Etiwanda Water Co., 122 Cal. 152,

In which cases it is held that a judgment is duly rendered when it is duly pronounced and ordered to be entered.

But the enforcement of a judgment does not depend upon its entry or docketing. Without docketing or entering, an execution may be issued, the land levied upon and sold, and the deed executed by the sheriff in fulfillment of the sale, and that not only proves the sale, but also estops the defendant from contraverting the title acquired by it.

Los Angeles County Bank v. Raynor, 61 Cal. 145.

Approved in

Jaynes v. Bullard, 107 Cal. 130, 132;

Riley v. Wright, 117 Cal. 77, 79-80.

There is nothing in any of the objections. There is nothing in the criticisms of the specifications in the statement on motion for a new trial. In the first place, neither the specifications, nor the statement is at all necessary to raise this federal question. It is raised upon the judgment record alone, as hereinbefore shown. Besides, the specifications were held sufficient by the supreme court of California, as is shown by the fact that they did consider these very questions.

Upon the question of the agency of the sheriff, we deem it unnecessary to say more than has already been presented in the opening brief.

III.

It is claimed that if there is a federal question raised such as would authorize the writ, the plaintiff in error is not entitled to any relief.

It is said that we claim that the payment should have been made in gold coin. Upon the record as cited by counsel for the respondents, it is evident that this is so. But the whole point with us in referring to this provision of the statute is not to complain that this redemption money was not paid in gold coin, but to show it was not paid at all. We have cited the provisions of the statute upon this subject for the purpose of proving beyond any question, that the statute meant that redemption should be made by paying the money, not by giving a check.

If there could be any question arising merely from the language of the statute requiring payment to be made in money, that term is used in the provision of the statute referred to, C. C. P. sec. 692, subdivision 4, wherein it is said that if the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this

section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment, in such way as to show it means what it says.

And when redemption is made, if the judgment under which it is made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

C. C. P., Sec. 704.

Under these provisions there is no room for interpretation as to what the statute meant by the term "money", and it is used in the same sense wherever it occurs in the provisions for the sale and redemption of property.

But, say counsel, a check given in payment, and afterwards paid, becomes a valid payment as of the date of its receipt, and for this proposition they cite 1st A. & E. Enc., page 174. We suppose this is a mistake, and it should have been the 18th A. & E. And in the place cited, in the first edition of that work, there is found the exact language quoted by counsel. But in the second edition no such passage occurs, but on the contrary, under the head of Payment by Bill or Draft, it is said that if the bill were actually paid, this will of course operate as a payment of the

debt for which the bill was given, and the payment *so far as regards the original indebtedness,* relates back to the time the bill was given.

22 A. & E., 2nd ed., p. 552.

The only authority cited for this is an English case which we have not had the opportunity to see.

But under the passage quoted by counsel from the first edition, a large number of cases were cited as authority for it, not one of which, to which we have access, has the slightest tendency to support that proposition.

In Washington Nat. Gas Co. v. Johnson, 16 A. 799, it was simply held that the check in that case was accepted in payment of all rents due on the lease.

In Lingenfelter v. Williams, 9 A. 653, the decision was that whether the notes were paid is a question of fact for the jury, to which it was properly submitted.

In Smith v. Miller, 43 N. Y. 171, it was held that the plaintiff could not maintain the suit against the drawer of the check, because he had failed to present it for payment within the time required by law.

In Borne v. First Nat. Bank, 123 Ind. 178; 24 N. E. 173, it was simply decided that a certified check was no exception to the general rule that

a check is not a payment, and especially when it is not the creditor that caused it to be certified.

In this case the testimony is that Mr. Wesley Clark, who was acting for the defendant Rhodes, and was interested with him, caused the check to be certified and took it to the sheriff, and thus delivered it to him. [See testimony of Clark, original page 185-188, print 102-104.]

Mullins v. Brown, 32 Kan. 312; 4 Pac. 305, not only does not sustain the proposition for which it is cited in the Encyclopedia, but is, on the contrary, an authority against the defendants in this case. There the check was made payable to an agent, by him presented to the bank, and the money actually carried to the account of the agent, and the bank then refused to pay the creditor because the agent was indebted to the bank, and the money which was thus deposited had been charged against his indebtedness. The court held it was no payment.

Tiddy v. Harris, 8 S. E. 227, determined nothing except upon the facts of that case, that the check was a payment.

Hunter v. Wetsell, 84 N. Y. 549; 38 Am. Rep. 544, determines nothing to the purpose. There a certain parol sale of goods was claimed to be void under the statute of frauds, because under the statute it was necessary that some part of the purchase price must be paid at the time. A check for $200 was delivered to the vendor, and

accepted by him, and subsequently paid, but he said it was not paid till after the contract was made, and the contention was, that that was not a payment at the time, within the statute of frauds. The court held that it was a good payment and said:

> "It is said, however, that the actual payment of the money, as distinguished from the delivery of the check, was not 'at the time' of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory, or downright perjury. The delivery of the check was such an act. Indeed, it would be an entirely reasonable and just construction to say that the delivery of the check and its presentment and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, *eo instanti*. It does contemplate that the contract and the payment shall be at the same

> time, in the sense that they constitute parts of one and the same continuous transaction. We think, therefore, there was a payment 'at the time,' within the meaning of the statute, and that the contract of sale was valid."

This is very far from the general proposition that whenever a check is paid, though a year after it is delivered, the payment is as of the date of the delivery of the check.

National Bank of Gloversville v. Wells, 79 N. Y. 500, is another case that simply determines that upon the circumstances of that case, the check was a payment.

Another case cited in the Encyclopedia is

> Comptoir D'Escompte de Paris v. Wm. Dresbach, 78 Cal. 15.

The case is directly against the proposition for which it is cited. The court quoted approvingly from Blair v. Wilson, 28 Gratt. 171, 172, the following passage:

> "The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt, in the absence of an agreement giving it that effect. Ordinarily, it is only a means of payment, and the debt will not be extinguished *unless and until the check be paid*, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained. If the check be not paid, and the payee is without fault, his right of action

against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer, either upon the debt or upon the check, at his option."

Id. p. 21.

But it is claimed by counsel that where redemption is attempted in good faith, and the correct amount paid as required by the law as construed by the highest courts, a change in the construction of such law should not forfeit the redemption, but he should be allowed to perfect it. And several cases are cited which are supposed to support that proposition, and wherein, trivial imperfections and defects in the redemption have been permitted to be cured.

But the first answer to this claim is that the supreme court of California has taken no such view of it. No such judgment has been given, and this court is dealing with the judgment actually pronounced by that court. Besides, there is nothing in this case to commend the defendants to the equitable consideration of this or any other court.

Rhodes was never a creditor of Mrs. Spencer until he bought this judgment, and this two or three months after she had sold the property, and it stood on the records in the name of another party, one Shepherd, and the record shows that he made that purchase for the purpose of mak-

ing himself a redemptioner, and connived and colluded with the grantee in the deed, Mr. Shepherd, and with Mrs. Spencer and others, to obtain this property, and simply as a pure speculation.

In Hervey v. Krost, 19 N. E. 125, the supreme court of Indiana, after saying that the right to acquire a lien upon real estate, by judgment, and the right to sell real estate, either upon execution or decretal order, is derived from, and regulated entirely by the statute, begins, continues and terminates at the will of the legislature, and that redemption is also a statutory right, said:

> "While the courts favor and give a liberal construction to redemption laws in the interest of the debtor and others who are concerned, that the debtor's property shall go towards the payment of his debts *to the full extent of its value,* and to whom the right of redemption may be their only means of protection, it never could have been intended that redemption laws should afford a rapacious creditor the means of speculating out of the property and upon the necessities of his debtor. Accordingly, a creditor who invokes the agencies of the law and exposes the property of his debtor to sale can thereafter do nothing, either by way of redeeming or otherwise, to defeat the title of a purchaser who purchased at the creditor's own sale, except by the authority of a statute fairly giving the rights."
>
> 19 N. E. 127.

The case is approved in Horn v. Indianapolis Nat. Bank, 9 L. R. A. 676, 682. And while the cases may be said not to be exactly parallel, yet we say again, upon the principle and spirit of those decisions, there is nothing in the position of these parties which should induce any court to consider the cause from any other standpoint than that of the statute which created the right, and measured its extent.

We call the attention of the court to another point in this case of Horn against the Indianapolis National Bank, wherein it was held that bringing a suit to redeem from a foreclosure sale will constitute an election on the part of the plaintiff to affirm the sale, and preclude his insisting on its invalidity. Such is the syllabus, and the discussion of that question will be found on pages 681-682.

IV.

Referring again to the sheriff's agency, it is submitted that whatever powers he possessed came exclusively from the statute, and that he had no authority to receive anything else than money is plain from the statutes. Acting as he was under powers derived from the law, he had no authority to receive anything else except money, and this the redemptioner was bound to know as well as the creditor. He had no au-

thority to ask the sheriff what he preferred, nor to act upon the information given him by the sheriff that he preferred a check. He knew, was bound to know, that a check certified at his instance was not a payment, nor did the statute of this state leave the redemptioner under any difficulties or embarrassment on account of the action of the sheriff. If the money had been tendered to the sheriff, and refused by him, the statute made the tender equivalent to the payment, and provided the method by which that tender was to extinguish all obligations, namely, by depositing it in a bank of good repute, notifying the purchaser at the sale that it was at his disposal, or notifying the sheriff to the same effect. He did not make a tender in the first place, nor keep it good in the second. He did not extinguish the obligation, because the statute says exactly what must be done to accomplish it, and not having extinguished it, he owed the obligation still, to pay that money. He owed it when the suit was commenced, and for months afterwards, and the cashing of the check by the sheriff nearly a year after the time of redemption expired, and after the suit was commenced, does not relate back to, and make the payment take effect as of, the time when the check was given the sheriff.

It may be said that these are state questions, and the judgment of the state court is to be followed by this court. But it is submitted that

that is not a correct statement of the situation here. If the supreme court of California had said, true the amendment to the statute cannot impair the obligation of your contract, that redemption could not be made by paying the purchase price and one per cent. per month, but the redemptioner did pay under the statute as it stood at the time the mortgage was made, would it conclude this court, when the exact price paid for the property, the exact sum paid for redemption is before you, and it is simply a question of arithmetic to see that the redemptioner did not pay under the old, but the new, statute? We think not. The jurisdiction of this court could not be evaded by an arbitrary conclusion of the state court upon facts undisputed, and before this court.

And so we say with respect to the time of redemption. If the check was not a payment of the money until it was cashed, the jurisdiction here cannot be avoided by the decision of the supreme court of the state holding that the redemption was within time, for the court has the same facts before it without a controversy between the parties at all, and if the payment did not take place until November 26th, 1899, the redemption was not made within six months, and in all cases of this kind, this court must necessarily determine for itself whether the proper amount was

paid, or paid within the time prescribed by the law, existing at the date of the contract.

It is submitted that the judgment of the supreme court of California should be reversed.

J. S. CHAPMAN,
Attorney for Plaintiff in Error.

IN THE

Supreme Court

OF THE

United States

John D. Hooker,
Plaintiff in Error,

vs.

John Burr, A. W. Rhodes, and W. A. Hammel,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

Statement of Facts.

The Spencers made a note and mortgage to Swigart, in 1893; Swigart assigned the note and mortgage to Bishop; Bishop foreclosed the mortgage, under which the property was sold on 13th June, 1898, and bought in by Hooker for $9500.00.

The title to the property in dispute and described in the mortgage was vested in Anna P. Spencer. Nichols held a note against her, dated

January 19th, 1897, the consideration of which was a debt for $875.00 created in 1896, on which suit was commenced by Nichols against Mrs. Spencer the ———— day of August, 1897, and obtained a judgment for $1015.35, which was docketed Oct. 1st, 1897.

In 1897, and before June 10th of that year, Mrs. Spencer was involved in debt and litigation. Besides the Nichols note she owed various other people, some of whom were secured by mortgages on her property to the amount of about $30,000.00 (including the Swigart mortgage).

And foreclosures were being threatened on these mortgages. She was also involved in litigation with Isabel Spencer, who was suing to recover the property from her. Also one Mulligan filed a suit against her in April, 1897, in which summons was served on her on 23rd April, 1897, for the sum of $43,600.00 [Tr. p. 65—Original Page 117, and Tr. 68—O. P. 122], and which suit was on the 10th day of June, 1897, pending in the Superior Court of Los Angeles county, California. While she was thus involved, she owned property valued at about $140,000.00, on which were the mortgages above referred to, amounting to about $30,000.00—though some of the property, to-wit, a ranch worth $2500.00 and other small properties worth $2000.00, were clear of incumbrances.

She had lost the suit in the Isabel Spencer case and was seeking to appeal to the Supreme Court and needed $1500.00 for immediate purposes in conducting the appeal [Tr. p. 57—O. P. 103 and Tr. p. 58—O. P. 105]. On June 10th, 1897, and for a long time prior thereto, she was indebted to Charles J. Shepherd in the sum of about $3000.00 [Tr. p. 98—O. P. 177 and Tr. 58—O. P. 105].

Her attorney, Judge Lamme, had vainly made repeated efforts to raise the money for necessities, to quiet creditors and carry on the appeal [Tr. p. 57—O. P. 103]. His efforts had proven futile, until he found Shepherd. Judge Lamme had been met on every hand with objections by money lenders that they would not loan money on the property on account of Mrs. Spencer being connected with it [Tr. p. 57—O. P. 103]. Judge Lamme then "concocted the scheme" of placing the property in Shepherd's hands [Tr. p. 57—O. P. 103] to raise the money, who was to undertake the matter of raising the money if the deed was made to him as security for his debt from Mrs. Spencer and the property turned over to him without "strings on it," so he could handle it. The purpose of making the deed was to place it in the hands of Shepherd as security [Tr. p. 58—O. P. 105].

So, under these conditions and circumstances,

by advice of her attorney, Judge Lamme, she executed the deed to Dickey, conveying to him without any consideration property worth $140,000.00 [Tr. pp. 51, 52, 53]. Dickey knew nothing of the deed [Tr. pp. 55 and 56—O. P. 100, 101], had paid nothing [Tr. p. 55—O. P. 100], and Shepherd paid nothing [Tr. p. 55—O. P. 100]. This deed was immediately put on record, and Dickey then, by dictation of Shepherd, who acted for Mrs. Spencer by advice of Judge Lamme, her attorney, and without any knowledge of the facts, executed a deed conveying all the property to Shepherd [Tr. p. 55—O. P. 100] the same day, which latter deed was not placed on record until December, 1898 [Tr. p. 39—O. P. 69].

After Dickey had conveyed all the property to Shepherd, he again, at the direction of Shepherd, on advice of Judge Lamme, and without any knowledge of the facts, executed a deed to Stiles, conveying 1-3 interest in the property [Tr. p. 55—O. P. 100].

Judge Lamme testified that he advised it, for the purpose of gaining time on the mortgage foreclosures [Tr. p. 60—O. P. 109].

Shepherd never claimed to own the property, and in all negotiations for the property, Shepherd did not pretend to claim it, but admitted that it belonged to Mrs. Spencer, and all the ne-

gotiations were carried on in the interest of Mrs. Spencer and through Judge Lamme, her attorney, Shepherd even referring the parties to Lamme and entering into the negotiations with them on behalf of Mrs. Spencer.

Shepherd did not treat the property as his own in other ways than that mentioned. He did not take possession of it nor collect rents from it—some of the property being rented, and Mrs. Spencer continuing to collect the rents [Tr. pp. 49, 50—O. P. 88, 89, 90, and Tr. p. 101—O. P. 182]. And Mrs. Spencer remained in actual possession in her own right of the property in dispute from a long time prior to June 10th, 1897, up to the time that the possession was delivered to Rhodes, in February, 1899 [Tr. p. 101—O. P. 182, and Tr. p. 75—O. P. 134]. Shepherd did not pay the taxes on the property for 1897; nor did he give it in for taxes in 1898, nor pay taxes on it for 1898, though he did pay taxes on his own property in 1897 and rendered a sworn statement to the tax receiver for 1898 of his own property, which did not include any of the property described in the Dickey deed [Tr. p. 100—O. P. 180, 181]. Also, at a further settlement between Mrs. Spencer and Shepherd, Shepherd took from Mrs. Spencer a second deed to the property, except that in controversy and the El Monte Rancho.

Nichols duly assigned his judgment vs. Mrs. Spencer to Rhodes in 1898, a long time before the redemption. About 12th day of December, 1898, Rhodes called Hooker up over telephone and told him he was redeeming the Spencer property, and that he intended to redeem the Broadway property bought by him, and made an engagement to meet Hooker at his place of business that day at 2 p. m. [Tr. p. 75—O. P. 134, 135]. At 2 p. m. Rhodes went to Hooker's place, prepared to make the redemption, and Hooker failed to meet his engagement. [Tr. p. 75—O. P. 134, 135.] That evening, about 6 o'clock, Rhodes, accompanied by Mr. Anderson, drove out to Hooker's residence, on Adams street, and carried with them the notices required by law to make the redemption; also carried $10,500.00 in gold coin to pay Hooker the necessary amount to effect the redemption. [Tr. p. 75—O. P. 134, 135.] When they rang the door bell, the servant came to the door, and, on inquiry, she stated that Mr. Hooker was in. Mr. Anderson requested her to tell Mr. Hooker that Mr. Rhodes and Mr. Anderson desired to see him, and soon she returned and stated that Mr. Hooker was not in. Rhodes and Anderson returned to the office of Clark & Bryan on Third street. Mr. Clark took the $10,500.00 gold coin and placed it in the First National Bank that

night for safekeeping by putting it in a drawer in the bank building, but did not make a *deposit* of it in the bank. The next morning Clark and Rhodes went to the sheriff's office and saw the sheriff and told him that Rhodes was going to make the redemption, and stated to him that Rhodes had the gold coin on hand with which to make the payment, and that he would bring up the gold coin from the bank to make the payment. The sheriff told them that he wanted a certified check and not the gold coin. [Tr. pp. 102, 103—Original Pages 185, 186.] Mr. Clark then went at once to the bank, *deposited* the $10,500.00 gold coin, and had a check for $10,070.00 certified by the bank and took it to the sheriff for Rhodes, and delivered it to the sheriff for Rhodes in payment of the redemption. [Tr. p. 103—O. P. 186.] When the payment was made and the redemption perfected—the same day, December 13th, 1898—the sheriff notified Mr. Hooker that he had his money on the redemption of the property. [Tr. p. 32—O. P. 55, Tr. p. 34—O. P. 59, Tr. pp. 36, 37—O. P. 64, Tr. p. 38—O. P. 67, Tr. p. 77—O. P. 137.] Hooker declined to accept the money from the sheriff. After Hooker declined to accept the money, the sheriff retained the certified check, and it was cashed in November, 1899. It could have been cashed at any time after it was delivered to the sheriff, and

was only kept by the sheriff as a matter of convenience, after Hooker had declined to accept the money.

A further statement of the facts is found in the opinion of the Supreme Court of California commencing at page 114 of Transcript. See particularly page 115 [Original Page 208].

The question now before this court is: Whether Rhodes, in making the redemption should have paid 2 per cent. on the purchase price as required by Sec. 702, Code of Civil Procedure of California, as the law stood in 1893, the date of the mortgage; or whether he should have paid only one per cent. as required by the law as it stood in 1898, the date of the sale.

The note and mortgage under which the sale was made was executed in 1893. Sec. 702, Code of Civil Procedure of California was then as follows:

"The judgment debtor or redemptioner may redeem the property from the purchaser at any time within six months after the sale, on paying the purchaser the amount of his purchase, with two per cent. per month thereon in addition, up to the time of redemption." * * *

In 1895 said section was amended by reducing the per cent to be paid on redemption from 2 to 1 per cent.

In 1897 the same section was again amended by changing the time of redemption from 6

months to 12 months, leaving the per cent. to be paid one per cent.

The sale was made in 1898—and the redemption was made within 6 months after sale, the redemptioner paying 1 per cent.

And plaintiff in error claims that 2 per cent. should have been paid on redemption as required by the law at the date of the mortgage contract; and that the amendment of the statute reducing the per cent. from two to one per cent. after the date of the mortgage contract was inapplicable, as being violative of the provisions of the constitution of the United States, because it impaired the obligations of the contract.

POINTS.

(Briefly stated.)

I.

That there is no question of a federal nature in the case which draws in question the construction of the Federal Constitution, or which would authorize the writ of error.

1. Where the same judgment could have been made without regard to a federal question a federal question is not raised. This judgment could have been made against the plaintiff in error without reference to the construction of the federal constitution:

(a) The plaintiff did not allege or prove the judgment under which he claimed to have purchased.

(b) The specifications of the plaintiff in error in his statement on motion for a new trial were not sufficient in form and substance to attack the findings of the court.

(c) The sheriff was agent of the purchaser for the purpose of receiving payment and the purchaser is bound by the act of the sheriff.

2. That the exact question as to the per cent to be paid has been adjudicated by a decision of the Supreme Court of the United States, which decision has never been overruled, and it is not now an open question, nor is it a *federal question* or a *question* at all, and does not draw in question the construction of the constitution of the United States.

II.

If there should be a federal question raised, or if there is drawn in question the construction of the Constitution of the United States, the plaintiff in error is not entitled to any relief.

1. It does not appear that the judgment obtained by Bishop, under which the sale was made, was made payable in gold coin of the United States.

2. The question as to whether the check was a payment, whether the check was cashed at once or after the time of redemption was out, or whether the check of Clark & Bryan was as effective as would have been the check of Rhodes, are not in any sense *federal* questions, and having been decided by the Supreme Court of California are conclusive and are not reviewable under the writ of error. This leaves the sole question to be reviewed to be as follows: Was the amount of per cent paid on redemption sufficient?

3. The amount paid was sufficient and was all the law required. That the law in force at the time of the sale governs the redemption.

The contract of the purchaser commences with his purchase.

The laws which entered into the contract are those which in their direct and legal operations controlled or effected the obligations of the contract.

The person who is not a *party* to the contract cannot complain that a law impairs its obligations.

The *party* to the contract cannot complain unless he is injured by the law of which he complains.

Every case depends upon its particular facts as to whether the law is applicable and constitutional or whether it is inapplicable and unconstitutional.

The identical question having been settled by the Supreme Court of the United States in Con. M. L. I. Company v. Cushman (108 U. S., p. 50), and reaffirmed in Barnitz v. Beverly (163 U. S., p. 118), is not now an open question.

4. If it should now be held that the laws at the date of the mortgage controlled as to the per cent. to be paid on redemption, and not the law at the date of the sale, we say that the law having been settled by the Supreme Court of the United States and by the decisions of the Supreme Court of California, for a long number of years, to the effect that the law at the date of the sale is the law which controls in making the redemption, that the redemptioner in this case had the right to assume that such was the law, and where the redemption was attempted in good faith he should now be allowed to perfect his redemption by paying the deficiency.

The foregoing points will be elaborated in the argument following, and authorities there cited to support them.

ARGUMENT AND AUTHORITIES ON THE POINTS ABOVE STATED.

I.

There is no federal question raised which would authorize the writ of error or authorize a review of the judgment of the Supreme Court of California on writ of error.

1. To entitle the plaintiff in error to review by writ of error, there must be "drawn in question the validity of a statute of or any authority exercised under, any state, on the ground of their being repugnant to the constitution * * * of the United States, and the decision is in favor of their validity."

That is, where the judgment to be reviewed cannot be made or upheld without drawing in question the validity of such statute and upholding its validity.

Even though such question is made in the pleadings and presented in the facts, yet if the judgment is such that it could be made or upheld on any other ground, to the exclusion of the federal question, then the judgment will be upheld on such ground and no such question is involved.

In other words, the federal question must be essential to the judgment, otherwise it is not involved.

Foster's Fed. P., p. 1188.

The fact that the federal question is discussed in the opinion of the court rendering the judgment, and the discussion of other grounds upon which the judgment might have been made are omitted, would not change or affect the rule, if such distinct grounds for the judgment exist. The opinion is not the judgment—it simply gives reasons for it—though it may omit many good reasons. Now can this judgment, from which the writ of error is issued, be upheld on any ground without involving the question of the per cent. to be paid on redemption?

We contend that there are grounds upon which the Supreme Court of California could have made the judgment without considering the question of the per cent. paid upon the redemption.

(a) Before plaintiff could recover in this case he must show a valid judgment under which he purchased. Where he seeks to set aside a deed made on redemption from a sale to him, one essential element of a valid purchase would be a valid judgment. Section 456 of the Code of Civil Procedure of California is as follows:

> Section 456. In pleading a judgment or other determination of the court officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly *given* or *made*.

Plaintiff only alleged in his complaint that a judgment was duly *rendered*. He did not allege

that it was *given* or *made*. Neither did he allege the steps which led up to the judgment. The allegation that a judgment was *rendered* is not an allegation that a judgment was *given* or *made*. The *rendition* of a judgment is held by the Supreme Court of California to be a signing and filing of the findings. The *rendition* of judgment does not constitute the judgment.

Crim v. Kessing, 89 Cal. 479;
Painter v. Painter, 113 Cal., p. 375;
Wood v. Etawanda Water Co., 122 Cal. 152.

And there was no evidence before the court proving the judgment.

(b) The specifications of error in the statement of the plaintiff on motion for a new trial in said action, did not specify the *particulars* wherein the evidence was insufficient to justify the decision. Section 659 of the Code of Civil Procedure in California, Subdivision 3, in part reads as follows:

"When the notice of motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement should specify the particulars in which such evidence is alleged to be insufficient." * * * "If no such specifications be made the statement shall be disregarded on the hearing of the motion."

The first nine specifications under this head do not specify any of the *particulars* in which the evi-

dence was insufficient to justify the decision, and consequently under the repeated rulings of the Supreme Court of California they cannot be considered in attacking the findings pointed out. 90 Cal. 323; 57 Cal. 617; 92 Cal. 617; 66 Cal. 552; 68 Cal. 528; 70 Cal. 136; 65 Cal. 402; 68 Cal. 528; 106 Cal. 652; 107 Cal. 703; 108 Cal. 365; 114 Cal. 346; 86 Cal. 128; 116 Cal. 416; 79 Cal. 449; 119 Cal. 5.

If there are sufficient findings to support the judgment besides those attacked, the judgment will not be reversed. Eliminating all the findings which were attacked by proper specifications, there still remained findings sufficient to support the judgment.

Kellerman v. Maier, 116 Cal. 417;
Spaulding v. Bradley, 79 Cal. 449.

The specification should be definite in pointing out the fact at which it is aimed, and specifications which are general in their scope, without pointing out any particular fact, will not be considered.

The specification which attacks a general proposition stated in one finding, cannot affect the specific facts found in other findings which taken together would make up the general proposition.

McCormick v. Natl. Surety Co., 134 Cal. 510.

(c) That the sheriff is agent of the purchaser for the purpose of *receiving* payment.

Sec. 704, Code Civil Procedure, California, provides: "The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him to the officer who made the sale."

The *payment* may be made to the officer who made the sale. He is the agent of the purchase for the purpose of *receiving payment*. He is not such agent to the extent of deciding *who* may make such payment. For that, he looks only to the proofs made by the redemption for his authority to redeem. And if the sheriff should *receive payment* from one who is not an authorized redemptioner, his act would not bind the purchaser and there would be no redemption. This is the extent to which the case of Bennett v. Wilson, 122 Cal. 516, goes. The law does not make him the agent to determine who may redeem. That is regulated by the proofs made under the statute. But the law does make him the agent to *receive payment*. Now when the redemptioner goes to the legally authorized agent of the purchaser to make his redemption, and this agent says only so much is necessary to effect redemption, and the redemptioner pays it in good faith, believing it to be correct, and the agent believed it to be correct, but the agent made a mistake of a few dollars, and the time for the re-

demption runs out,—who should suffer for the agent's mistake? Should the redemptioner lose his right to redeem on that account, or should the purchase have recourse upon his agent for his mistake? We say, therefore, that the act of the agent, in receiving payment, as between the redemptioner and purchaser, binds the purchaser, so far as the *payment* is concerned, where it is all done in good faith and there is no fraud.

The citation from Freeman on Executions (3d Ed., Sec. 320), quoted by counsel for plaintiff in error, contains this statement: "Such officer is deemed to be so far the agent of the person from whom the redemption is sought to be made, that he may waive the latter's right to object to a tender or payment by the redemptioner, part of which is national bank notes or paper currency."

In People v. Mayhew, 26 Cal. 656, it was held that the sheriff was special agent of the purchaser to receive payment, and might receive current money which was not legal tender, though objected to by the purchaser,—that his discretion is like that on receiving payment on sale under execution.

The scope of the agent's authority is in *receiving the payment.* In this it is not limited—though the *amount* is fixed by statute. And when he acts within his authority, an innocent mistake on the part of the agent could not, either

in morals or law, jeopardize the rights of the redemptioner.

So, if this be the law, then the judgment may be upheld without regard to any federal question in the case.

(d) Where the question has been decided by the Supreme Court of the United States, which decision has never been overruled but has been approved in a later case by the same tribunal, there is no federal question involved; in fact, no *question* at all.

In the case of Con. M. L. I. Company v. Cushman, 108 U. S. 50, this court decided the identical question presented here.

That was a case where Cushman executed to Con. M. L. I. Company a mortgage and at the date of the mortgage the redemption laws of Illinois required the payment of 10 per cent. on redemption. After the execution of the mortgage, the redemption laws were amended, reducing the per cent. to be paid on redemption from 10 per cent. to 8 per cent. The Con. M. L. I. Company foreclosed the mortgage and the property was sold after the change in the law reducing the per cent. The mortgagee was the purchaser at the sale. The mortgagor redeemed the property and paid the 8 per cent. as required by the law at the date of the sale; and thus arose the question which is exactly in point with the case before the court.

Quoting from Con. M. L. I. Company v. Cushman, the court say:

"The statute in force when the mortgage was executed prescribing the rate of interest which the amount paid or bid by the purchaser should bear as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. * * * The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when * * * the sale occurred. Thenceforward its interest in its property was as purchaser, not as mortgagee; and to require it as purchaser to conform to the terms for the redemption of the property as prescribed by statute at the time of the purchase, does not in any legal sense impair the obligations of its contract as mortgagee." * * *

This decision was made in the year 1883 and such has been the law ever since. It has never been doubted in any subsequent decision by this court, but was referred to and approved in Barnitz v. Beverly (*supra*) and was therein distinguished from that case.

The case of Barnitz v. Beverly, in which the Con. M. L. I. Company was approved, is the authority relied on by plaintiff in error for raising the question in this case. We submit that where this court has decided the question and such decision has remained the law and the rule of property for 21 years that it is not now a *question* and

the Federal constitution having been construed the question could be raised again. It is the fixed and settled law of the land and not a *question.*

In Kansas v. Bradley, 26 Fed. R. 289-290, this court said: "When a proposition has once been decided by the Supreme Court of the United States, it can on longer be said that there still remains a Federal question. More correctly it is said that there is no question, state or federal."

And the same in Bluebird Mining Co. v. Largey, 49 Fed. R. 289-291.

While these decisions were upon the question as to the jurisdiction of the Circuit Court, we see no reason, on principal, why they would not equally apply to the proposition here presented.

For these reasons there is not drawn in question the construction of a clause of the constitution of the United States, wherein the decision is against the right claimed; which is necessary to authorize the writ of error; and the judgment of the Supreme Court of California should be affirmed.

II.

If there is such question raised as would authorize the writ of error, the plaintiff in error is not entitled to any relief.

1. Plaintiff in error claims payment should have been made in gold coin.

(a) We contend that it nowhere appears either in the pleadings or the evidence that the Bishop's judgment under which the sale was made was "made payable in gold coin", or any specific kind of money. To obtain a judgment payable in a specific kind of money, the statutes of California [Section 667, Code of Civil Procedure] requires: "In all actions for the recovery of money, if the plaintiff alleges in his complaint that the same was understood and agreed by the respective parties to be payable in a specific kind of money or currency and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint."

The allegation in the complaint in the case at bar in reference to the specific kind of money is that in the suit of Bishop v. Spencer "judgment was duly rendered, whereby it was adjudged that there was *due* to the plaintiff $6782.49 gold coin of the United States."

This is not an allegation that the judgment "was made payable in gold coin." To allege that there was *due* to the plaintiff gold coin is not equivalent to alleging that the judgment was "made payable in gold coin." The court might have adjudged that gold coin was *due* to Bishop, but at the same time, could not make the judgment "payable in gold coin" because Bishop had failed to so allege in his complaint as required by section 667, C. C. P., for it is only when it is so alleged in the complaint that the court is authorized to make the judgment "payable in a specific kind of money; and there was no evidence at the trial in the case at bar, showing that the Bishop judgment was made payable in gold coin.

Besides, when sale is made, the officer making the sale must give to the purchaser a "certificate of sale" [Section 700, Code Civil Procedure, California]: "and when the judgment under which the sale has been made is made payable in the specific kind of money or currency, the certificate must show the kind of money or currency in which such redemption must be made, which must be the same as that specified in the judgment."

There was no evidence before the court at the trial of the case showing what kind of money was specified in the certificate of sale, and it is not alleged in the complaint that the certificate of sale issued to Hooker required the redemption to be

made in gold coin. [See paragraph 5, amended complaint, Tr. p. 16.]

(b) We would also suggest that where the plaintiff was notified by the sheriff the day the redemption was made, that he had the money for him, and he refused to accept it, he is estopped from denying that it was paid to the sheriff and also estopped from asserting that the check was not cashed by the sheriff. He did not refuse to accept the money because it was paid by a check, nor on account of the amount, but only because he claimed that Rhodes was not a redemptioner. [See original complaint, Tr. pp. 1 to 6.] Hooker was undoubtedly trying to evade the redemption as evidenced by his keeping out of the way when Rhodes made an ineffectual attempt to make the tender to him personally. [Tr. p. 75, O. P. 134, 135.]

After Hooker refused to accept the money from the sheriff, he cannot be heard to say that it was not offered to him. Section 1515, Civil Code (Cal.): "A refusal of the creditor to accept performance made before an offer thereto, is equivalent to an offer and refusal."

(c) We also say that there was a tender of the gold coin to the sheriff by Rhodes when he and Clark went to the sheriff and offered to pay the gold coin, and the sheriff instructed them to bring a certified check as payment instead of the gold

coin. They had the gold coin then at hand and were ready, able and willing to deliver it to the sheriff at once, but the sheriff, the lawful agent of the purchaser "to receive the payment", requested the redemptioner to deliver the certified check, and not the gold coin.

Besides there was a written tender to the sheriff, the agent of Hooker, of the money "in gold coin of the U. S." [See Transcript, p. 98, O. P. 175. See also section 704, Court of Civil Procedure, as follows]: "A tender of the money is equivalent to payment."

Sec. 2076, Code of Civil Procedure (California): "The person to whom a tender is made, must at the time specify any objection he may have to the money, instrument or property, or must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterward."

See also Freeman on Execution, Sec. 320, as to right of sheriff as agent to waive objections for purchaser.

2. Plaintiff in error claims that payment for redemption could not be made by check; and that though it could be made by check yet the check presented, not being the check of Rhodes, the redemptioner, for that reason it was of no effect.

First, We say that the question as to whether the check was payment, whether the check of

Clark & Bryan was as effective as the check of Rhodes; whether it would make any difference whether the check was cashed at once or later (under the circumstances in this case), as mentioned in the last nine pages of plaintiff in error's brief, are all questions which could be and were decided by the Supreme Court of California, upon the *facts* presented, regardless of and without involving any federal question; and are conclusive, and are not reviewable under the Writ of Error.

But to meet the objection on those points, if the judgment should be reviewed in that regard, we insist that payment may be made by check, and that it is immaterial whose check was presented, just so as it was on behalf of the redemptioner and accepted by the sheriff as such.

The evidence shows that Rhodes and Clark went together and made the redemption, and Clark stated what he did was for Rhodes and as Rhodes' agent. One may do by his agent what he may do for himself [Sec. 2305, Civil Code]. Being a certified check, it really became the check of the bank; for when a check is certified by a bank, it is treated as paid as between the bank and drawer, and the bank becomes liable in the place of the drawer.

Thorn v. San Francisco, 4 Cal. 127, cited by plaintiff in error, is a very early case. On the

point as to the *check* being payment, the case has never been followed by any other case in this state. That decision was made in April, 1854, at the time there were only three judges, and this view was held by only one judge, to-wit: Justice Wells, who delivered the main opinion in the case.

Chief Justice Murray in concurring says: "I concur in the conclusion to which my associate, Justice Wells, has come, but my opinion is based upon the grounds:

"1st. That act of 1851 is prospective in its operation.

2nd. That there was no legal redemption (as it appears from the findings of the court below) made by any authorized person".

Judge Heydenfeldt dissented from the opinions of his associates.

It follows that so far as payment by check is concerned, that being the opinion of only one judge, it was not a part of the decision of the court, and never has been obligatory as law.

Besides, this case was decided at a time when commercial conditions were very different from what they are now.

Business was then generally done by the payment of *cash money*, whereas now nearly all business is done through the banks; and it would be a strict construction in this commercial era, when all business is done by checks and drafts, to say

that payment made by check, where the check is paid on presentation, is not a payment.

"Payment is a transfer of money from one person, the payor, to another, the payee." [Rap. & Law. Law Dict.]

It has been held by various courts of high authority that the delivery of a check, where the drawer has the money in the bank to pay it, and which is afterwards paid, is payment of the money itself. This question is clearly settled by the decision in Buford v. Heinzer, 8 Biss. 177. [The same case is found in V. 4, Federal Cases, page 607.]

The same question is decided and upheld in Jessup v. Carey, 61 Ind. 584, and Carter v. Lewis, 27 Mich. 241, and Webb v. Watson, 18 Iowa 537.

The case in 8 Biss. 177 is full, and the identical point is made. And in it, Judge Gresham says that delivery of the check was payment of the money as the check only answered as the means of transferring the money to the payee.

"A check given in payment which is afterwards paid, becomes a valid payment as of the date of its receipt."

The above is the text of the Eng. and Am. Encyp. of Law, Vol. 1, page 174, on the question of payment; to which there is a very copious note referring to decisions in almost every state in the union.

In 78 Cal. 15, it is held that a check is condi-

tional payment—the condition being that the check be paid, and it constitutes absolute payment, and relates back to the delivery of the check, when the check is paid.

In Poorman v. Woodward, 2 How. (U. S.) 266, it is held that a certificate of deposit constitutes a good payment, if the certificate is duly paid.

In Bridges v. Garret L. R., 5 C. P. 454, it is held that a check given in payment, which is duly honored, is good as payment.

The principle upon which these decisions are based, is that the check is simply the mode of transferring the money from one to another.

All these later decisions show that the theory upon which Justice Wells based his opinion in Thorne v. San Francisco, 4 Cal. 127, is incorrect. In that opinion, the court fails to consider the point that a check is only the means of transferring money. And the reason the justice gives why it should not be allowable, to-wit: that the sheriff's bond might not be good to respond to the purchaser for damages, or that the sheriff might prove a defaulter, is fallacious, in that, if the money was paid, the same results could as easily follow.

The extent to which Sec. 319, Freeman on Executions, goes, is that the sheriff cannot waive

the presentations of the proofs, etc., that the person applying to redeem is a proper redemptioner.

58 Cal. 431, cited by plaintiff, is on the question of rescission. The court incidentally decides that a "two days' check" was not a sufficient *tender*.

There is a difference in what may constitute a sufficient *tender* and what would amount to *payment*.

If the check were accepted as tender it would constitute a sufficient tender; so, if received as payment, it is payment when paid. A check received in payment is always provision or conditional payment; that is, payment provided the check is paid.

While *payment* in the strict legal sense must be in money, a check in payment as a *payment in money when* the check is duly honored—the check being merely the process by which the money is delivered.

There is no dispute on the question that a note or judgment, made payable in gold coin, is not discharged by a tender of money of less value. The question here is, was a check, upon which the gold coin would have been paid on presentation, and upon which it was obtained, a *payment?* Counsel for plaintiff assumes that it was not a payment, because it was not money, ignoring the views taken by all modern decisions that the

check simply represented money and was the means of transferring it. Had it not been for the opinion of Justice Wells in 4 Cal. 127, it is probable that such question would never have been made.

The numerous authorities, cited by appellant on the question of tender, have no bearing upon this case. This is not a question of tender; all these authorities are on the theory that tender and payment must be in money, and a party has the right to reject either if offered by check. But we say, if the check is accepted, it is good as tender or payment, provided it is duly paid. One could not compel another to accept a check as payment, no more than a check would be a good tender. But if the check is accepted, it is a conditional payment—conditioned upon payment of the check—and becomes absolute when the check is paid—the same as money—and the payment relates back and is of the date of the delivery of the check.

The trouble with plaintiff in error is in falling into the error that a *tender* and *payment* are on the same plane; and that a check, given as payment, which *is not paid* is the same as a check given as payment which *is paid*.

The authorities cited by him on this subject refer to *tenders* and to checks or notes given as payment, which were *not paid*. These decisions are not questioned as being good authorities upon the

points in them made, but they are useless to elucidate the question as to whether a check given in payment, which check *is duly paid,* does not constitute a payment. Another distinction counsel for plaintiff in error fails to make is, that where a good check is offered as payment, and *not accepted,* that it is different from when a check is accepted and paid.

Haskell v. Manlove, 14 Cal. 57, and Wilcon v. Miller, 49 Cal. 194, treat simply of the necessity of a redemptioner complying with the statute in presenting the proofs of his right to redeem; and where he failed to produce among the *proofs* a copy of "the docket of the judgment" his proofs were not sufficient.

The substance of Freeman on Executions, quoted by plaintiff in error, is simply to the effect that bank checks, etc., and money which is not *legal tender* cannot be used for payment when they are *objected to* as such. But that authority nor any others (except Thorne v. San Francisco, 4 Cal.) which is the basis of Freeman's text, goes to the extent of holding that a check which is *received in payment,* and which *is paid* is not payment.

The same may be said of Dingley v. McDonald, London and S. F. Bank v. Parrott; Dallapiazza v. Foley, Equitable National Bank v. Griffin & Skelly Co. None of them are at all ap-

plicable to the question before the court, which is: Was the check which was *accepted as payment,* and which check *was duly paid* on presentation at the bank, a *payment?* We say that we do not believe that there can be found a case except Thorne v. San Francisco which holds the doctrine that such check is not payment. Nor does Villhac v. Biven, 28 Cal. 409, have any bearing on the question. In that case there was a fraudulent tender, which was refused and the court held that it was not a payment.

None of these cases cited by plaintiff in error in the last ten pages of his brief touch the question. They all go to the point as to what is not good as tender when it is refused. In other words, what may the creditor refuse to accept as a tender or payment. They do not touch the question as to what is a good tender or a payment if accepted by the creditor.

A check offered in payment of a debt, if objected to and not accepted, would not be good as tender or payment. But if it is accepted by the creditor and afterward paid, it is good as tender and payment.

III.

Plaintiff in error claims that the law in force at the date of the mortgage controlled in the redemption, and not the law which was in force at the date of the sale. That the law passed after the mortgage contract, though before the sale, did not apply, because it impaired the obligations of the mortgage contract.

At the time this redemption was made the statute required one per cent. to be paid on redemption. The law reducing the per cent. to be paid on redemption was passed in 1895. It was in force prior to the date of this sale, but subsequent to the execution of the mortgage. The mortgage was executed some time in 1893; the law reducing the per cent. to be paid on redemption from two per cent to one per cent. was passed in 1895, and the sale took place in June, 1898. Counsel for plaintiff in error claims that the statute of 1895 reducing the per cent. to be paid on redemption is inapplicable, because it would impair the obligations of the contract, that is, the obligations of the mortgage contract which was entered into by Swigart with Mrs. Spencer.

Hooker was not the mortgagee, but was an outsider who purchased at the sale. The case upon which appellant principally relies on this point is Barnitz v. Beverly in 163 U. S. 122, wherein it

is decided that "a statute which authorizes the redemption of property sold upon foreclosure of a mortgage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage."

The question first came before the Supreme Court of California in Thorne v. San Francisco, 4 Cal. 127, on the power of the legislature to give the right of redemption where none previously existed as to an ordinary execution sale. There it was held that the right of redemption could not be given where the law giving it was passed after the judgment, but before the sale. The opinion in that case was by Justice Wells and concurred in by Chief Justice Murray; but Justice Heydenfeldt delivered a very able dissenting opinion.

The same point again arose in Seale v. Mitchell, 5 Cal. 403, in which Thorne v. San Francisco was approved. But the approval was based upon the principle of *stare decisis,* so stated by Justice Heydenfeldt in delivering the opinion of the court. The subject (though not the exact question as in Thorne v. San Francisco) next came up in Tuolumne R. Co. v. Sedgwick, 15 Cal. 515. In this case, for the first time, the identical question as to reducing the per cent. to be paid on re-

demption in mortgage foreclosure sale, came before the court. Here the law was passed after the execution of the mortgage, and before the sale, reducing the per cent. from six per cent. to four per cent., and Thorne v. San Francisco was in effect overruled, and the dissenting opinion of Justice Heydenfeldt in Thorne v. San Francisco was approved and followed, and the principle settled that the law passed, after the mortgage, but before the sale, applied and governed as to the per cent. to be paid.

The question next came up in Moore v. Martin, 38 Cal. 428. The question in that case was allowing redemption from an ordinary execution sale where no right of redemption existed prior to the contract upon which the judgment was obtained.

Here Thorne v. San Francisco was distinctly overruled, and Tuolumne R. Co. v. Sedgwick was approved—the court holding: That a law giving the right of redemption in ordinary execution sales, passed after the contracts were executed and even after judgments, but before the sale, did not impair the obligations of the contract.

Thus the rule in California was established, and has existed in this state up to the present time, that to reduce the per cent. to be paid on redemption, by a law passed before the sale does not impair the obligations of the contract.

These early decisions, here quoted, have not been overlooked by the Supreme Court of California in later cases. In Oullahan v. Sweeny, 79 Cal. p. 539, Tuolumne R. Co. v. Sedgwick and Moore v. Martin are cited with approval.

Also in Teralta Land Co. v. Shaffer, 116 p. 523, both of said cases are again cited with approval. And in Allen v. Allen, 95 Cal 205, Chief Justice Beatty, in his dissenting opinion, refers to the dissenting opinion of Justice Heydenfeldt in Thorne v. San Francisco as authority and the law of California.

Therefore we say that it is not an open question in California, but that it has been the settled law of that state since the decision in Tuolumne R. Co. v. Sedgwick, 15 Cal., year 1860, that a law passed before the sale of property under a mortgage foreclosure (though after execution of the mortgage) reducing the per cent to be paid on redemption is valid, and does not impair the obligations of the mortgage contract.

This view of the law, established by the Supreme Court of California, has been sustained and approved by a decision of the Supreme Court of the United States in Conn. M. L. Ins. Co. v. Cushman, *supra*, and these decisions have never been denied or overruled by any decision of the Supreme Court of California or of the Supreme Court of the United States. So, we find, that

up to the present time, it is so established as a rule of law by the California Supreme Court and by the Supreme Court of the United States.

In Barnitz v. Beverly this court say: "The case of Conn. M. L. I. Co. v. Cushman, 108 U. S. 51, does not collide with the previous and subsequent cases."

This is an approval in Barnitz v. Beverly, of the Conn. M. L. I. Co. v. Cushman, and a direct declaration that it is not in conflict with that case.

The case of Teralta Land etc. Co. v. Shaffer, *supra,* is not in conflict with Tuolumne R. Co. v. Sedgwick nor with Conn. M. L. I. Co. v. Cushman. In the Teralta Land Co. case the question was whether a law passed *after the sale* would be applicable, showing that the Supreme Court regarded that the contract of the purchaser commenced at the sale. And to further emphasize this view, the court in that case say: "The right of property acquired by the purchaser at this sale and the right of redemption remaining in the owner must both be governed by the law in force *at the time of the sale.*" And further in the same case the court say: "The enforced sale of property on execution, or for non payment of taxes, constitutes a contract with the purchaser which cannot be materially altered without his consent." Also in Blood v. Light, 38 Cal. 658; Hammond v. Cailleaud, 111 Cal. p. 220, and

Thesher v. Atchison, 117 Cal. p. 75, this court held that a sheriff's sale is regarded, in law, as a sale by the judgment debtor, and the purchaser's contract commences with the sale.

Appellant places stress upon the expression in Thesher v. Atchison, *supra,* that "the same principles which render void an act extending the time for redemption after the sale has been made, will render void an act reducing the amount of money required for a redemption from such sale."

This is true. But it should be considered in connection with what the court in the same opinion further say, to-wit: "The sale by the sheriff is regarded as a sale by the judgment debtor; and the purchaser is entitled to rely upon the statutory provision for redemption *existing at the time of the sale* to the same extent, and in the same manner as if they were incorporated into a contract of sale executed by the debtor."

Also it is true that the same principles which would render void an act shortening the time of redemption would render void an act increasing the amount of money required for redemption from such sale. An act reducing the amount or extending the time would have a direct and necessary legal operation upon the obligations of the *contract of purchase,* but not upon the original debt contract; while an act increasing the amount, or shortening the time would have a direct and necessary legal operation in its effect

upon the *rights of the mortgagor* under the mortgage contract.

It was held in McCracken v. Hayward, 2 How 608, that, "The obligation of a contract is its *binding force* on the *party* who makes it."

The obligation or *"binding force"* of the mortgage contract between Swigert and Mrs. Spencer was that Mrs. Spencer would pay the debt according to the terms of the note, and she hypothecated as security for the performance of this obligation a certain estate in the property—that estate being, that if the debt should not be so paid Swigert may sell the property and the purchaser thereof should go into possession after the expiration of six months.

The key to the solution of this question and upon which all these decisions may be reconciled and any supposed conflict which may seem to exist between them may be avoided, is found in the following language from the opinion in Conn. Mutual Life Ins. Co. v. Cushman, *supra*, to-wit: "The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their *direct or necessary legal operation controlled or affected the obligations of such contract.*" The law which is passed after the mortgage contract is executed granting to the mortgagor the right of redemption, when none previously existed, does, in its *direct and necessary le-*

gal operation, affect the obligations of the mortgage contract in this, that it takes from the mortgagee a part of the estate which is bound to him under the contract as his security. There is the obligation on the part of the mortgagor that on default of payment, the mortgagee may sell the estate and go into possession. Where the time of redemption is given under such circumstances, a portion of the estate which is actually delivered as security under the mortgage contract is carved out of it, and consequently the law has a direct and necessary effect upon the obligation of the mortgage contract.

The binding force of the mortgage contract is, that the entire estate is pledged as security. So if a law is passed subsequently, reducing the estate, it affects the obligation that the entire estate may be sold for the payment of the debt. So also if the time for redemption is extended it adds to the estate in favor of the mortgagor, and takes from the mortgagee a portion of the right which has been secured to him under his contract. But as to the per cent. to be paid on redemption it is different. There is no obligation of the contract that the mortgagor will redeem. The only obligation that exists, in the mortgage contract, is, if the mortgagor does redeem, that he shall not be required to pay more than two per cent. That is the obligation that rests upon the mortgagee. But there is no binding force in the mortgage

contract that the mortgagor will redeem at all. He has the right of redemption. It is a privilege which he can exercise at his will, but there is no obligation upon him to redeem. So, the law changing the per cent., enacted after the execution of the mortgage, does not *directly* control or affect any of the obligations of the mortgage contract. If it affects it at all, it is remote and indirect, depending upon contingencies. One of the contingencies is that there must be a sale; also that the property may not at the decretal sale bring enough to pay the debt. . In Murphy v. F. & M. Bk., 13 Cal. p. 120, this court said: "Presumably, mortgage property would have a market value greater than the mortgage debt, the lender would rarely loan up to the full cash value." Also another contingency is that the mortgagor would redeem. But the Supreme Court of the United States in 108 U. S., *supra,* say that these contingencies may never happen, and that they "are too remote to justify the conclusion as a matter of law, that such legislation affected the valuation of the mortgage contract;" or that the parties contracted with reference to them.

It is unquestionably a fact that the laws of the state, at the time a contract is made, so far as they in their *direct and necessary legal operation control or affect the obligations of the contract,* enter into the contract and become a part of it.

But the laws of the state, which may ultimately upon some contingency affect the obligations of the contract, but do not in their *direct and necessary operation* affect its obligations, do not enter into or become part of the contract.

When we take a sale under a mortgage foreclosure we find the questions of costs enter into the ultimate results; but they are remote, and consequently those questions as to what it would cost to file suit, or for the sheriff to serve papers, or for the sheriff's certificate of sale and deed, could not be regarded, as a matter of law, that the parties contracted with reference to them, on account of the remoteness of their effect. It could not be held that where a note is given that the redemption laws enter into and form a part of the contract of debt. In Haynes v. Tredway, 133 Cal. p. 401, the court assumes a distinction between ordinary execution sales and sales under mortgage foreclosure.

We say that where Conn. Mutual Life Ins. Co. v. Cushman is distinctly cited and commented upon in Barnitz v. Beverly, with approval, and there stated that it does not conflict with Barnitz v. Beverly, we have been at a loss to understand wherein there could have been any question upon this point.

The construction given to law by the highest courts, is the law of the land to the same extent as legislative enactments; and remains so until

overruled; and the laws so declared by the highest courts form part of contracts the same as statutes. Now, the law of the land at the time this mortgage contract was made, as construed by the Supreme Court of California and by the Supreme Court of the United States, was that the legislature has the power and authority at any time before a sale, to change the per cent. to be paid on redemption. And if the contention made by counsel for the appellant is correct, that all the laws would enter into the contract, then that law must have entered into the contract and become a part of it, and the parties contracted with reference to the law which gave the legislature the right to change the amount of per cent. to be required on redemption at any time before the sale; and if that law entered into the contract, then it cannot be said that the obligation of the contract was impaired by the subsequent law, because, as stated in the opinions which were rendered in those cases, the creditor must look to the law at the time of the sale to see what the right of redemption is and what the per cent. is that is to be paid.

In regard to the amount to be paid on redemption, it is held in Robertson *et al.* v. Van Cleave *et al.*, 129 Ind. 217-231, (same case found in L. R. A., vol. 15, p. 68), that the statute reducing the rate of interest to be paid on redemption from a foreclosure sale does not impair the obligation

of a contract where the rate to which it is reduced is not lower than the rate of interest agreed upon in the mortgage. In this case the case of Con. M. L .Ins. Co. v. Cushman is considered and followed.

Quotations from Con. M. L. I. Co. v. Cushman and Barnitz v. Beverly would not be amiss, to show the reasoning of the court, and also that the case of McCracken v. Hayward, and others on the same line, were considered.

The following is quoted from the opinion in Con. M. L. I. Co. v. Cushman:

"The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when he received what the mortgage and the statute in force when the mortgage was executed, entitled him to demand.

"The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. *The company ceased to be a mortgagee when* its debt was merged in the decree, or, at least, when *the sale occurred.* Thence forward, its interest in the property was as purchaser, not as mortgagee.

And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by statute, at the time of purchase, does not, in any legal sense impair the obligation of its contract as mortgagee. It assumed the position of a purchaser subject, necessarily, to the law then in force defining the rights of purchasers."

"But it is insisted that the value of the mortgage contract was impaired by a subsequent law reducing the interest to be paid to a purchaser at the decretal sale; this, upon the assumption that the probability of the debt being satisfied by the decretal sale of the property, was lessened by the reducing of the interest which any purchaser could realize on his bid in the event of redemption. In other words, the reduction, by a subsequent statute, of the interest to be paid to the purchaser would, it is argued, necessarily tend to lessen the number of bidders seeking investments, and thereby injuriously affect the value of the mortgage security."

"In support of this proposition counsel cite several decisions of this court, in which it is ruled that the objection to a law, as impairing the obligation of a contract, does not depend upon the extent of the change it effects; that the laws in existence when a contract is made, including those which affect their validity, construction, discharge and enforcement, enter into and form a part of it, measuring the obligation to be performed by one party, and the rights acquired by the other; and that one of the tests that a contract has been impaired is that its value has been diminished, when the constitution prohibits any impairment at all of its obligation. Green v. Biddle, 8 Wheat. 1; McCracken v. Hayward, 2 How. 612; Planters' Bk. v. Sharp, 6 Id. 327; Edwards v. Kearxey, 96 U. S. 601 (XXIV, 796)."

"These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. We have seen that no reduction of the rate of interest, as between the purchaser of mortgaged property at decretal sale and the party entitled to redeem, affected or could possibly affect, the right of the insurance company to receive, or the duty of the mortgagor to pay, the entire mortgage debt, with interest as stipulated in the mortgage up to the decree of sale. And the result of the sale, in this case, shows that the company, as mortgagor, has received all that it was entitled to demand. The reduction of the rate of interest by the act of 1879 was by way of relief to the mortgagor and his judgment creditors, and in no sense an injury to the mortgagee."

"When that act was passed, there was no person to answer the description to claim the rights of a purchaser; consequently no existing rights were thereby impaired."

"That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur, unless there was a decretal sale, nor unless the mortgagee became the purchaser; and are too remote to justify the conclusion, as a matter of law, that such legislation affected the value of the mortgage contract."

It can be seen that Barnitz v. Beverly might be applicable to Allen v. Allen, as, in both the ques-

tion arose as to the effect of subsequent statute upon the original *contract* of the *parties*. In Allen v. Allen, it was a question of extending the Statute of Limitations for suit to redeem, and in Barnitz v. Beverly, it was a question of allowing a redemption where none existed at the time the contract was made.

But in Con. M. L. I. Co. v. Cushman, the question involved is the rights of the purchaser.

In that case, the court holds that the contract of the purchaser does not exist until after the sale, and the decision is consistent with both Allen v. Allen and Barnitz v. Beverly. It has never been held by the Supreme Court of California, nor by the Supreme Court of the United States that the purchaser had any contract until after the sale; and consequently the obligations of his contract could not be affected by legislation prior to the sale, except so far as it affected the *title* to the property purchased.

In Con. M. L. I. Co. v. Cushman, this court say, that the mortgagee's rights under the original contract cease at the sale, and if he purchases at the sale he stands as any other purchaser.

Referring to the Con. M. L. I. Co. v. Cushman, in Barnitz v. Beverly, this court say:

"The case of Con. M. L. I. Co. v. Cushman, 108 U. S. 51, does not collide with the previous and subsequent cases. There the new statute did

not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of the payment, nor affect any remedy which the *mortgagee* had by existing law for the enforcement of his contract. Neither is the case of Morley v. Lake Shore & Michigan Southern Railway Co., 146 U. S. 162, in any wise inconsistent with the cases above cited."

After stating the conclusion reached in Barnitz v. Beverly, the court goes on to say:

"Let us briefly apply the conclusions thus reached, to the facts of the present case," then the court goes on to apply the facts as follows: "The plaintiff was the holder of several promissory notes, dated November 1st, 1885, secured by a mortgage of the same date upon a tract of land in Shawnee county, Kansas. The mortgage contained an express waiver of an appraisement of the real estate. Default in payment having ensued, the suit was brought, praying that the mortgaged premises should be sold according to law, without appraisement, that the proceeds arising from the sale should be applied to the payment of the indebtedness due the plaintiff, and that the defendants should be forever barred and precluded of any right of redemption. Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed, and the sheriff's deed issued. Thereafter the mortgagor or owner had no possession, title or right in any way, to the premises.

"Under the new law, the mortgagor shall have eighteen months from the date of sale within which to redeem, and in the meantime the rents, issues and profits except what is necessary to keep up repairs, shall go to the mortgagor or the

owner of the legal title, who, in the meantime, shall be entitled to the possession of the property. The redemption payment is to consist not of the mortgage debt, interest and costs, but of the amount paid the purchaser with interest, costs and taxes. In other words, the act carves out for the mortgagor or the owner of the mortgaged property, an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all incumbrances), but a remainder —an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profits. The twenty-third section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem. Obviously, this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation. We of course have nothing to do with the fairness or policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction, that such a change in the law is not merely the substitution of one remedy for another; but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate

is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises, subject to an estate or right of possession in debtor or his alienees for eighteen months? Martha Barnitz held Kirtland's notes, secured by mortgage. Of course, under the contract thus created, she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right to again levy thereon and subject it to the payment of the remnant of her debt. But this law, as we have seen, in express terms, declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale, at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they become the property of the debtor. Nor can it be said that such a question is not now before us. What we are now considering is whether the change of remedy was detrimental to such degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act does deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is competent for the state to change the form of the remedy, or to modify it

otherwise, as they see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties."

It is plain to see from these two cases [Conn. M. L. I. Co. v. Cushman, and Barnitz v. Beverly], that there is no general rule that applies to every case, but that each case depends upon its own facts, and that the legislation objected to applies or does not apply to the particular case, according as there is a right impaired or not. In other words, if the party complaining of the operation of the law is not injured by it, and if the obligations of *his* contract are not impaired, the law will apply and operate. In the case at bar, the party complaining is simply a purchaser, but he is claiming, as such purchaser, that the obligations of the contract between Swigart and Mrs. Spencer were impaired by this law. He occupies no relations to those parties, and is not in as favorable position to complain as the plaintiff was in the Conn. M. L. I. Co. v. Cushman.

But counsel for appellant argues that Hooker had the right to assume that the laws at the date of the original contract applied, and that he bought, expecting to get 2 per cent. interest and not 1 per cent. on redemption. But that is answered by the statement that, when he bought,

he knew that the law allowed only 1 per cent. instead of 2 per cent., and that he bought subject to the laws in existence at the time of his contract. He is therefore not injured by the operation of this law.

Neither Swigart or Bishop could complain that the act of 1897 was inapplicable, because they received all that Mrs. Spencer obligated to perform. Then how could a stranger to the mortgage contract be heard to complain because, in some uncertain contingency, Swigart might have been injured?

In Brine v. Insurance Co., 96 U. S. 637, the court say: "All the laws of a state existing at the time a mortgage or any other contract is made which affect the rights of the *parties to the contract,* enter into, and become a part of it."

If the obligations of a contract consist in its binding force upon the *party making it,* and the laws which become a part of the contract are those which affect the rights of the *parties to the contract,* how can it be said that to reduce the amount of the redemption money would come within the perview of these decisions?

These rights and obligations of the contract of Spencer to Swigart were fully secured and performed, and were in no sense affected by the law changing the per cent. to be paid on redemption; nor was the estate purchased by Hooker in the least affected by it.

But in the case of Barnitz v. Beverly the changes in the law prevented the sale of the entire estate mortgaged, and kept the mortgagee from the enjoyment of the estate purchased at the sale, for eighteen months, without any right to the rents or possession. The estate to be sold under the new law was different from that authorized by the mortgage, and the time of the enjoyment delayed. The *reasons* for the decision in Barnitz v. Beverly and the distinction between it and the Conn. M. L. I. Co. v. Cushman could not be better given than to read what we have before quoted from those cases.

Where there is no redemption, none can be given by subsequent statute, because it changes the conditions of mortgagee's rights. Where the right of redemption exists, it is not a right of the mortgagee, except so far as it cannot be extended, but the *right* of the mortgagor, and the time in which to redeem cannot be shortened as against him, because it is his right to redeem and that would impair his right.

Sale by the sheriff being regarded in law as a sale by the judgment debtor, when a sale occurs, it is a new contract, and has no relation to or connection with the original contract.

The amount to be paid by the purchaser is not the amount of the judgment, but is the amount of his bid, his contract. It may be more or it may be less than the judgment. And the amount

to be paid on redemption is measured in the same way, not by the original contract, but by the contract of the purchaser.

Duff v. Randall, 116 Cal. 230.

The case of Thrasher v. Atchison, 117 Cal. 73, has reference only to the effect of laws passed *after* the *sale.*

There the court say: "The provision in the law (to pay 2 per cent.) forms an element in the purchase at the sale, and constitutes a term in the *contract under which the purchaser paid his money* to the officer. *At the time of his purchase,* the statute provided that at the expiration of 6 months thereafter, he should receive a conveyance of the land, unless it should before that time, be redeemed from the sale by the payment to him of the amount of his purchase, with 2 per cent. per month until the time of such payment, * * *

"By the purchase, Greene became vested with an interest in the land, of which he could be deprived only by the mode *then* fixed by law."

The case of Teralta Land Co. v. Shafer, 116 Cal. 518, is to the same effect and has reference only to the contract of *purchase.*

It will be seen that these decisions are based upon the question as to disturbing the rights of the purchaser *after* his *contract* of *purchase.* Neither of them pretend to hold that the purchaser has any contract or right, or rights in any contract prior to the sale.

There is no claim that the statutes have a retro-

active operation. This claim is not necessary for the operation of our statute upon the contract of purchase. Nor is such claim essential to the harmony of the great weight of authorities on the subject. On examination of the authorities, it will be found, that it must appear a *contract right* has been impaired to make the law inoperative.

A law that impairs a vested right is inapplicable and inoperative as to the right which is impaired. A statute passed *after* the sale, extending the time or diminishing the amount of redemption would be inoperative as to the purchaser; because it would impair his rights; but would be operative and valid against the debtor because his rights would not be impaired. So, a statute passed after the sale or even after the original mortgage contract, shortening the time and increasing the amount of redemption would be inoperative as to the mortgagor, as it would impair his right in the privilege of redemption. But the mortgagee would not stand on the same ground, because redemption is not his right.

The claim of counsel for appellant that a sale, under a mortgage foreclosure, relates back to the mortgage as a muniment of title does not change the rule. The same is true of sales under judgment, where there has been attachment. He had just as well claim that the purchaser, at a com-

mon law sale, could claim the levy of the attachment as a part of his contract of purchase. While the sale relates back to the levy of the attachment so far as to protect the title, the contract of the purchaser only dates from the sale, in every instance.

IV.

A general review, in answer to the argument and authorities of plaintiff in error on the question of reducing the per cent.

We deem it a useless task to follow counsel of plaintiff in error through the first pages of his argument on the question "That the laws in force at the time of the contract enter into the contract", as the highest judicial determination of that question was made in the case of Con. M. L. I. Co. v. Cushman, and it was there stated what laws "enter into the contract."

It is not that all the laws of the land enter into the contract, but only those which may be legally assumed to have been contemplated by the contracting parties. Bronson v. Kenzie, 1 How. and McCracken v. Hayward, 2 How., are the leading cases which first give rise to this subject of litigation—the *impairment* of the obligations

of contracts. Perhaps, there are not in the books a case which furnishes more encouragement to those who assert that the "obligations of contracts are impaired" than the case of McCracken v. Hayward. And it has proven a fruitful source of litigation, from the fact, that in it general principles, upon the subject are laid down, and it has been the pillar of support in all this class of cases since its rendition.

But we find that this valuable authority has been misinterperted by the profession and has often caused questions of this character to be raised which could not be sustained on principle or on that authority. It seems to have been relied on by the company in Con. M. L. I. Co. v. Cushman, and there this court took occasion to distinguish it, and show that it did not apply.

There is no question that the *remedies* cannot be changed to such extent as would *impair* the rights of the *parties* under their contract.

Remedies may be changed at the will of the state, provided no substantial right secured by the contract is *impaired.*

And without criticising each case on this subject, cited by plaintiff in error, it is enough to say that in all of them where it has ever been held that the law would not apply, that the operation of the law would work a substantial injury to the *party* to the contract.

The same may be said of all the authorities cited by plaintiff in error on pages 17 to 23 of his brief.

Further, none of the authorities cited by plaintiff in error on the subject of the *title* of the purchaser—that the *title* relates back to the mortgage, and that the "purchaser stands in the shoes of the mortgagor" bear upon the question before the court, except so far as they show that the *title* relates back to the mortgage or judgment.

There is no dispute between us that the *title* of the purchase at foreclosure sale relates back to the mortgage; and also at execution sale, it relates back to the judgment; also where there has been attachment, it relates back to the attachment.

These authorities are so palpably foreign to the question before the court, that we deem it consuming time to take them up *seriatim.*

Benson v. Bunting, 127 Cal. 532, Malone v. Ray, 134 Cal. 344, and Haynes v. Treadway, 133 Cal. 400, cited by plaintiff in error, merely follow Barnitz v. Beverly and are based upon it for authority, and do not assert any new principle.

On page 33 of his brief plaintiff in error says, "That no distinction can be made between the time of redemption and the amount to be paid for redemption. That is certainly the rule in this state."

We beg to differ with counsel and say that such is not the rule in California. The distinction has been sharply drawn in this state by the *decisions.* Ever since the case of Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515, to the present time it has been the rule in this state that the per cent. to be paid on redemption may be reduced *before* the sale.

The distinction is based upon the same principle stated in Con. M. L. I. & Co. v. Cushman, to-wit: the contract of the purchaser commencing *at the sale,* he has the right to rely upon the law as it existed *then;* and that the redemption laws *which do not affect* the mortgage contract are not a part of that contract, and may be changed.

On page 34 of plaintiff in error brief, after citing Teralta Land Co. v. Shaffer and Thrasher v. Atchison, he says:

"We are not citing these cases as determining anything as to what the contract of Hooker, the appellant, is. We only say that whatever may be the contract, it is, by the decisions of the Supreme Court of California, determined that the laws for the redemption of property from the sale, existing at the time the contract is made, are a part of the contract, and that any law either extending or shortening the time of redemption or increasing or diminishing the amount to be paid, is in violation of that contract."

The answer to his statement is:

First, that he is in error as to his premises; the Supreme Court of California has not "deter-

mined" that the *redemption laws* existing at the time the original contract, are a part of that contract; nor has the Supreme Court of California decided that to increase or diminish the amount to be paid on redemption impairs the mortgage contract. Not one of the authorities cited by plaintiff in error sustains that proposition.

What the Supreme Court of California has decided is this: "That a law reducing the amount to be paid on redemption or extending the time of redemption passed *after* the sale is void as to the purchaser, as impairing his contract of purchase. [Teralta L. Co. v. Shafer, Thrasher v. Atchison.] Also that a law *extending* the time of redemption is void as to the original contracting *parties*, because it impairs said contract.

Benson v. Bunting;
Malone v. Ray;
Haynes v. Treadway.

The only privity Hooker, as purchaser, has with the original contract is so far as may be necessary to protest the *title* of the mortgaged property; and for that purpose the title purchased by him relates back to the mortgage.

Now, if a law passed after the mortgage contract, affected the title to the property such as carving out of it a life estate to the mortgagor;

or an estate for years; the purchaser would be in such privity with the mortgage contract as to protect his purchase, though his contract would not commence until the purchase; because such law would affect the title of the mortgaged property. Extending time of redemption also affects the title of the mortgaged property, because it takes from the mortgagee a right to the possession within a certain time, which is a portion of the estate pledged, and consequently takes away a part of the estate purchased. He has a right to have possession of the property within a specified time after sale, and to extend that time takes away that right. And this is true whether the law is passed before or after the sale. But the purchaser has no right to the money to be paid on redemption until he becomes a purchaser at the sale.

So, we see, that the rights under the mortgage contract which may be invoked by a purchaser are only such as affect the *title* to the mortgaged estate.

To reduce the interest to be paid on redemption does not in any sense take from the mortgagee any of the security pledged, nor lessen its value, nor in any degree diminish the obligations of the mortgagor to pay the debt; nor affect the *title* to the mortgaged premises. All of these are still secured to the mortgagee and purchaser. Certainly then the purchaser could not complain

where the law does not take from him any right. He still has the right to the property to the full extent as it was mortgaged; the same time to enter into possession, with no diminution of the estate pledged.

The statement made by the plaintiff in error that the "redemption laws" enter into and form a part of the mortgage contract is too broad. All the redemption laws do not enter into the contract. It is only such laws "which in their direct and necessary legal operation controlled or affected the obligation of the contracts."

There is no conflict between Con. M. L. & Co. v. Cushman and Barnitz v. Beverly; nor is there "involved a complete contradiction of terms" in the opinion of Justice Hnshaw in this case; nor is the case of Barnitz v. Beverly or the cases in California decided incorrectly.

In the first place it may be stated that the contract of the purchaser commences *in all cases at the sale.*

Also it may be said that only those laws which in their *direct and necessary legal operation control or affect* the contract, enter into it.

Also it may be said that no one can complain of the operation of a law who is *not injured* by its operation.

That extending the time of redemption affects the *title* to the property, as it places a *condition* upon the enjoyment.

That reducing the per cent. to be paid does not affect the *title* to the property nor any *obligations of the mortgage* contract.

Even though it should be contended, that under some circumstances, the mortgagee might complain of a law reducing the per cent. to be paid on redemption, passed before the sale, as tending to impair his mortgage contract, yet the purchaser (other than the mortgagee) could not complain of such law as he cannot invoke any right of the mortgage contract except such as affects the *title;* but must look to the law of the date of the sale as to the per cent. to be paid.

Also that the purchaser may invoke the obligations of the mortgage contract to protect his *title,* and no more (though his contract did not begin until the purchase).

This right could be exercised as to any law which affects his *title.* A law saying that the last mortgage takes precedence could be objected to by the purchaser, but a law directing how the mortgage should be foreclosed could not. A law placing a tax upon mortgage might be objected to by the mortgagee; also a law placing the costs of filing a suit at a prohibitory amount; also a law requiring the mortgagee to pay 2-3 of the amount of his mortgage to the sheriff as expense of a sale. But in none of these instances could the *purchaser,* as such, invoke the rights of the mortgagee. But any law

which affected the *title* to the property purchased could be objected to by the purchaser, and he could, for the purpose of protecting his *title*, stand in the shoes of the mortgagee.

Justice Henshaw, who rendered the opinion in this case, did not make a mistake (as stated by plaintiff in error, page 39 of his brief) in saying that since the case of Tuolumne R. Co. v. Sedgwick, 15 Cal., that the rule in California has been contrary to that contended for by plaintiff in error. We say that the statement by the learned Justice was absolutely correct, and that plaintiff in error has not, and cannot produce a single decision to the contrary.

In the case of Thorne v. San Francisco, the question was not the same as presented here, and consequently not the same as presented in the Con. L. I. & Co. v. Cushman; nor was it the same as presented in Barnitz v. Beverly. The question in the Thorne case was whether under ordinary execution sale a law passed after the contract for the debt, but before the sale, giving a right of redemption where none existed at the time the debt was contracted, was valid. In that case the law was held invalid.

That case is not in accord with the Cushman case, nor is it the same principle as Barnitz v. Beverly. And the Thorne case has not been followed in California, nor has the question there

decided been approved by any decision of this court.

The principle upon which the case of Barnitz v. Beverly was decided is obviously different,—being a mortgage contract, wherein certain property was pledged as security which the subsequent law affected by taking away a part of it. And while the question was not identical with Allen v. Allen, 95 California 184, the principle decided there was the same—being that a law subsequent to the mortgage extending the statute of limitations in which the mortgagor may sue to redeem, was not operative—in other words, a law extending the time to redeem, passed after the mortgage contract. The decisions of the Supreme Court of California, as to questions decided on this subject have not, in the least fluctuated since the case of Tuolumne R. Co. v. Sedgwick. There may be at times, in some of the opinions, expressions by the Justices showing doubt upon some proposition connected with the subject. But the *decisions* have been uniform, and in no case was the correctness of the Tuolumne case ever doubted.

If none of the California cases drew a distinction between the question of *reducing the per cent.* and *extending the time* it was because the question never arose. In Thrasher v. Atchison and Teralta L. Co. v. Shafer, the *principle* was the same whether the per cent. was reduced or

the time extended, because it had reference to a law passed *after* the sale. In Allen v. Allen, the question of per cent. did not arise,—that case having reference only to extending the time. So, we see that the occasion for the Supreme Court of California to refer to the difference, upon principle in these two questions never arose until this case.

There is one thing in the Tuolumne case which is worthy of notice; that in discussing the power of the legislature to change the laws, the language of the opinion has reference to the particular facts of that case. Note the following:

"The act of 1851 gave the right (to redeem) to a judgment creditor. If before he is a judgment creditor, the law is repealed, he could not have any claim redeem."

Again:

"The plaintiffs here had not at the time of this repeal or alteration so availed themselves, and therefore the law as to them might be repealed. The effect of this alteration not being to divest any right they had but only to prevent them from having a right, which, before that time they might have had."

The foregoing is quoted to show what the court had in mind when the expression quoted by plaintiff in error from the opinion was used.

There is no question as to the power of the legislature to regulate the redemption of property on foreclosure sale. And it may change

such laws at any time provided the obligations of contracts are not impaired. It may prescribe as the rule of redemption that the mortgagor may redeem upon paying one per cent., and that judgment creditors shall pay two per cent. And that where the law at the time of the mortgage requires the payment of only one per cent. it may thereafter, before the sale, be changed so as to require the payment of two per cent., and the law would be valid as against all persons except the mortgagor.

Counsel on page 49 of his brief says:

"There is an expression in the Cushman case, not easily reconcilable with the decision, and quotes that portion wherein it is said:

" 'The mortgagor might perhaps have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage,' and counsel says if the statute could be invalid as to the mortgagor it must be invalid to the mortgagee." And on page 53 he says that if the power to change the amount paid upon redemption exists at all it must be unlimited, having in mind doubtless the statement which occurs in the opinion McCracken v. Hayward, 43 U. S. 2 How. 608, and quoted in Barnitz v. Beverly, 163 U. S., that if the power to impose conditions upon the sale exist at all, it may be exercised to any extent. The same

conclusion, however, does not follow at all as to the power to change the interest to be paid upon redemption.

The expression quoted by counsel from the Cushman case was doubtless made to prevent misconception as to the extent of the decision, as the question was not involved, and inasmuch as the reduction in this case was not to an amount less than the interest stipulated for in the original loan, it is not necessary to the decision of this case that the court should decide whether a reduction below such stipulated interest would impair the obligations of the contract. But as the question of the power being unlimited may have some bearing upon this discussion we wish to suggest that there is an essential difference between the extension of the time for redemption or the imposing of burdensome conditions upon the sale, and the change in the rate of interest to be paid upon redemption.

In the former case, the subsequent law as applied to existing mortgages instantly operates upon them by enlarging the estate of the mortgagors or by restricting the remedy, and hence necessarily impairs the obligation of all existing mortgages by retarding or postponing or restricting the enforcement of the obligation.

But a subsequent law reducing the penalty or interest upon redemption may or may not affect the right of a mortgagee to receive a certain in-

terest on his money or get the property in case he purchases the same (assuming that his relation after purchase is that of mortgagee and not simply that of purchaser). If his stipulated interest is 8 per cent. per annum and the reduction leaves 1 per cent. per month, he would still in case of redemption get more interest than his contract originally called for. Whether his rights would be impaired in the constitutional sense if the penalty was reduced to an amount less than his stipulated interest or less than the statutory interest after judgment, need not be discussed, as it is not material here, but if such result were admitted, for argument's sake, still it does not follow that a law, such as that under discussion, which did not so reduce such penalty would be unconstitutional.

These rights, as we have stated, are to receive his money with stipulated interest—8 per cent. up to judgment and 7 per cent. after judgment up to the sale of the property—by reducing the penalty for redemption from 2 per cent. to 1 per cent. per month he is not injured in any way, he would still upon redemption get more than his contract stipulated for in the way of interest. The enforcement of his contract is not in any way postponed or retarded and the efficiency of his remedy is not in any way relaxed. No new estate is created, nor is it diminished or enlarged.

In Antoni v. Greenhow, 107 U. S. 769, 27 S. E. 468, after stating the general rule, that the laws applicable which are in force enter into and form a part of the contract, the court says:

"But it is equally well settled that changes in the form of action and mode of proceeding do not amount to an impairment of the obligations of a contract if an adequate and efficacious remedy is left.

"It is competent for the state to change the form of the remedy or to modify it, otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. In all such cases, the question becomes therefore one of reasonableness, and of that the legislature is primarily the judge. [Jackson v. Lamphine, 3 Pet. 290; Terry v. Anderson, 95 U. S. 633.] We ought never to overrule the decision of the legislative department of the government unless a palpable error has been committed."

It is admitted on all sides as before stated, that the *remedy* may be changed. It is also conceded that such changes must not be such as not to leave an adequate *remedy* to enforce. And where the change in remedy is such as to substantially depreciate the value of security, that such would be in violation of the constitutional provision.

Yet if the change in the remedy was such as to impair the rights under the original mortgage contract, even such as taking away all per cent. to be paid on redemption, a purchaser who buys after such law is passed, must stand by his contract

of purchase, and cannot avail himself of the rights of the mortgagee to object to the law. Why?

Because his contract begins at the sale; he must look to and be governed by the laws as they exist at the sale, for his rights; and the reducing the per cent. does not affect the *title* to the property purchased, nor in any sense lessen his estate.

V.

Where redemption is attempted in good faith, and the correct amount paid as required by the law as construed by the highest courts, a change in the construction of such laws should not forfeit the redemptioners. But he should be allowed to perfect his redemption.

4. There is one other question: That is, even if the amount paid on this redemption was insufficient because of the payment of a less per cent. than was required by the old statute, yet where the party attempted in good faith to make this redemption, he had a right to assume, under the authorities as they existed at the time the redemption was made, that the legislature had the right to change the per cent. and he had a right to assume that one per cent. was all that would be required; and if he paid less, on that assump-

tion, than what might be now held to have been required, that still he would have the right to pay this additional per cent., where he set up in his answer and offered that if it should be held to be required that he would allow the plaintiff to take judgment against him for that amount. That is, that where he had pursued in good faith what appeared to be (and what was) the law of the land at the time he made this redemption that in equity he should not be deprived of his right of redemption where he offers to pay all that may be required under a different construction of the law, and offers to allow judgment to go against him for that amount; that he would be entitled to perfect his redemption upon payment of the amount. 127 Cal. 532, and 119 Cal. 463.

Parnell v. Hall, 45 Cal. 193;

Kofoud v. Gordon, 122 Cal. 314.

And a trivial deficiency in payment will in equity be disregarded, no matter how it may have occurred without the wilful act of the one seeking to redeem.

Hall v. Fisher, 9 Barb. 17.

And where the correct amount is a matter of dispute and grave doubt such as to involve a judicial construction of a statute as applied to the constitution of the United States, before it can be definitely determined what is correct, and the redemptioner paid all that was required by the

sheriff, and all the law required, as it was construed then by the highest court of the world, he is not called upon to do more than offer to pay what additional amount may be so found, and let it go in as a condition of the judgment.

It being so, that the weight of authorities on this subject may be reconciled, by the views we have presented, we can see no reason why the settled rule of property which has controlled for more than twenty-one years by reason of the construction given to the law by this court, should now be disturbed.

Respectfully submitted

W. H. ANDERSON,
Attorney for Defendants in Error.

E. C. BOWER and
ANDERSON & ANDERSON,
Of Counsel.

Supreme Court of the United States.

No. 263.—October Term, 1903.

John D. Hooker, Plaintiff in Error,
vs.
John Burr, A. W. Rhodes and W. A. Hammel.
} In error to the Supreme Court of the State of California.

[May 16, 1904.]

The plaintiff in error commenced this action in the proper State court to procure a decree cancelling a deed of the premises mentioned in the complaint, executed by the defendant Hammel to the defendant Rhodes, and also directing that a deed should be executed to the plaintiff by defendant Hammel or Burr, or both, conveying the same property to the plaintiff, which had been purchased by him under the sale in foreclosure hereinafter mentioned. Defendant Burr was sheriff at the time of that sale, and conducted the same and executed the certificate of sale June 13, 1898. His term of office expired in January, 1899, and defendant Hammel became his successor, and as such executed the deed to defendant Rhodes, which plaintiff in error asks to have set aside. The two defendants, Burr and Hammel, were made parties herein because it was not certain which one of them should be decreed to execute the deed to plaintiff which he asks for in this suit.

The defendants by their answer denied many of the material allegations of the complaint, and the case went to trial before the court, and a judgment having been entered dismissing the complaint on the merits, an appeal was taken to the Supreme Court of California, which affirmed the judgment, (137 Cal. 663,) and the plaintiff has brought the case here. The material facts are as follows:

On October 16, 1893, Anna P. and Ambrose H. Spencer, then being the owners of the property, mortgaged the same to one Jacob Swiggart, to secure the payment of a promissory note of the same date for $5,000. This note and mortgage were subsequently assigned by Swiggart to Charles H. Bishop, who afterwards commenced a suit upon the note and mortgage to recover the amount due on the former and to foreclose the mortgage. On May 14, 1898, a judgment was entered in the case, whereby it was adjudged that there was due to the plaintiff upon the note the sum of $6,782.49, and that the same was a lien upon the mortgaged premises, and there was also a judgment for the sale of the premises to obtain payment of the sum found due on the note. On May 16, 1898, an execution upon

the judgment was issued to the sheriff, (Burr,) and on June 13, 1898, he sold to the plaintiff in error, Hooker, the mortgaged premises for the sum of $9,500, who thereupon paid the amount of his bid to Burr, and Burr then gave a certificate of sale to the plaintiff as the purchaser. Plaintiff alleges that he was entitled to a deed from the sheriff of date December 13, 1898, that being six months after his purchase at the foreclosure sale. On December 12, 1898, Rhodes, one of the defendants, (who was a judgment creditor of Spencer, the mortgagor,) issued an execution on his judgment and assumed to redeem the land from the foreclosure sale by the payment of $10,070 to the sheriff, to be paid to the purchaser, the plaintiff in error, being the amount of the purchase price paid by the latter at the foreclosure sale, together with interest thereon at the rate of one per cent per month. The sum was received by the sheriff as the full amount due to the plaintiff in error on his bid, with interest. The plaintiff in error declined to accept the money, and now contends that the amount delivered to the sheriff for the redemption was not enough, and he also makes the claim that there was never any legal payment to the sheriff, even of the sum mentioned. The sheriff, after receiving the redemption money, executed a deed to the judgment creditor, Rhodes, and it is this deed which plaintiff seeks to have set aside.

At the time when the above mentioned mortgage was executed, on October 16, 1893, the law in California provided that a judgment debtor or redemptioner might redeem the property from the purchaser at the foreclosure sale, at any time within six months after the sale, on paying the purchaser the amount of his purchase money with interest at two per cent a month thereon in addition up to the time of redemption. On March 27, 1895, the legislature altered this statute, which was section 702 of the Code of Civil Procedure, by providing that redemption might be made upon the payment of the amount of the purchase money with *one* per cent a month as interest thereon, and on February 26, 1897, the same section was again amended by the legislature by extending the time for redemption to twelve instead of six months, while keeping the rate of interest at one per cent per month on the amount of the purchase price paid at the sale.

It will be noticed that both these amendments had been enacted and existed as the law in regard to redemptions at the time when the sale was made on June 13, 1898, upon the foreclosure of the mortgage.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The plaintiff in error contends that the several alterations of the law as it existed at the time when this mortgage was executed, regarding the time of redemption and the amount of interest payable to the purchaser

at the foreclosure sale in order to redeem the land sold, impair the obligation of a contract as to all mortgages in existence before the alterations were made.

The first inquiry is, Whose contract was impaired by the alteration of the law? It is seen that the amount due on the mortgage in question at the time of the sale upon foreclosure was $6,782.49, and that the property sold for $9,500. That amount was paid by the purchaser to the sheriff and it resulted in the payment of the mortgage debt, principal and interest, and the release of the land from the lien of the mortgage. Subsequently to that payment the mortgagee had no interest in further proceedings. Neither the mortgagee nor his assignee was the purchaser at the sale, and neither was in any manner injured by the alterations of the law in the respects mentioned. If, therefore, there was by this legislation an impairment of the obligation of a contract between the mortgagor and the mortgagee, which the latter could have taken advantage of if injured thereby, it is perfectly clear that he is not in the least injured when, by the sale under his mortgage, he realizes the full amount of his debt, principal, interest and costs. What can he complain of under such circumstances, even conceding an abstract impairment of the obligation of his contract? Having realized and been paid in full the entire amount of money called for by his mortgage, he surely cannot be heard to complain that nevertheless the obligation of his contract was impaired. If not injured to the extent of a penny thereby, his abstract rights are unimportant.

We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint. (*Tyler* v. *Judges &c.*, 179 U. S. 405; *Turpin* v. *Lemon*, 187 Id. 51, 60.) If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot of course ask the interference of the court. Therefore, if the mortgagee, or his assignee, were himself the plaintiff, and complaining that the obligation of his contract had been impaired by subsequent legislation, it is plain his complaint would be dismissed when it appeared that, notwithstanding the alleged subsequent illegal legislation, he suffered no injury, because he had proceeded with the foreclosure of his mortgage and had been paid the full amount of his contract debt, interest and costs. Under such circumstances the question becomes a moot one, and courts do not sit to decide that character of question. (*American Book Company* v. *Kansas*, 193 U. S. 49; *Jones* v. *Montague*, decided April 25, 1904.)

The question of the impairment of the mortgage contract, therefore, is not before us, as between mortgagor and mortgagee.

We are of opinion that, as to the plaintiff in error, an independent purchaser at the foreclosure sale, having no connection whatever with the original contract between the mortgagor and mortgagee, his rights are to be determined by the law as it existed at the time he became a purchaser, unless upon action taken by the mortgagee the property had been sold under a decree providing that it should be sold without regard to the subsequent legislation which impaired his contract. The purchaser bought at the time when the law as altered was in operation, and, so far as he was concerned, it was a valid law; his contract was made under that law, and it is no business of his whether the original contract between the mortgagor and mortgagee was impaired or not by the subsequent legislation. He cannot be heard to contend that the original law applies to him, because a subsequent statute might be void as to some one else. The some one else might waive its illegality or consent to its enforcement, or the question might have no importance, because the property sold for enough to pay the debt, even though there was an abstract impairment of the obligation of his contract.

The purchaser must found his rights upon the law as it existed when he purchased. An alteration after he had purchased, to his prejudice, would be a different thing. (Cooley on Const. Limitations, 4th ed. 356.) We agree that the law existing when a mortgage is made enters into and becomes a part of the contract, but that contract has nothing to do, so far as this question is concerned, with the contract of a purchaser at a foreclosure sale having no other connection with the mortgage than that of a purchaser at such sale. His rights regarding matters of redemption are to be determined as we have stated.

It has been so decided in the case of *Connecticut Life Insurance Co.* v. *Cushman*, (108 U. S. 51.) There the property was sold at foreclosure sale for enough to pay the mortgage debt (page 56), and the reduction of the rate of interest which was payable to the purchaser at the foreclosure sale, upon a redemption, (which reduction was made by the legislature prior to the sale, although subsequently to the mortgage,) was held valid. The company, as purchaser at the foreclosure sale, bid enough to pay the principal and interest of its debt, and after the purchase it contended that the attempted redemption was insufficient because the interest upon the amount it had bid upon the sale had been computed at eight per cent, the rate of interest allowed by law at the time of the sale, instead of ten per cent, the rate existing at the time of the execution of the mortgage. It was held that as to the purchaser the rate existing at the time of the sale was the legal rate and the redemption at that rate was valid. The principle of that case decides the one at bar.

It is asserted, however, on the part of the plaintiff in error that *Barnitz* v. *Beverly* (163 U. S. 118,) has in effect overruled the former case, and

that upon the principle decided in the Barnitz case the plaintiff in error herein is entitled to a reversal of the judgment. We are not of that opinion.

In the first place, it was distinctly stated in *Barnitz* v. *Beverly* that it was not inconsistent with and did not overrule the former case, and its facts show a clear distinction between the two cases. The sum bid at the foreclosure sale did not pay the amount due on the mortgage, and the whole case shows that, although the mortgagee became purchaser, the debt of the mortgagor was not thereby paid, and it was the mortgagee's rights under her contract, as contained in the mortgage, and not her rights as a purchaser at the foreclosure sale, that were in controversy.

In the Cushman case, on the contrary, the amount bid at the foreclosure sale paid the mortgage debt, and the subsequent position of the mortgagee was as a purchaser only. The Barnitz case was decided distinctly upon the ground that, by the subsequent legislation, there was an impairment of the obligation of the contract between the mortgagor and the mortgagee, and it was her rights as mortgagee that were passed upon and recognized by the court. This is plain from a perusal of the opinion, especially at pages 130 and 131.

Attention is also called by plaintiff in error to a portion of the opinion in which it is stated that, "Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." And it is asserted that such a case is now before the court.

These remarks must be interpreted in the light of the facts of that case and must be limited in their application to the parties to the mortgage contract whose rights are impaired by subsequent legislation. If the mortgage had been foreclosed and the mortgagee had thereby realized his debt, principal and interest in full, upon the sale, there can be no doubt that he would not have been heard to assert the invalidity of the subsequent legislation, nor would an independent purchaser at the sale have been heard to make the same complaint. Of course, this does not include the case of a mortgagee who purchases at the foreclosure sale and bids a price sufficient to pay his mortgage debt in full with interest, and an action thereafter commenced against him to set aside the sale because it was made in violation of legislation subsequent to the mortgage. In such case we suppose there can be no doubt of the right of the mortgagee to assert, as a defence to the action, the unconstitutionality of the subsequent legislation as an impairment of his contract contained in the mortgage. But it may be

said that where the legal or equitable rights of a party are not in any way touched and he is in no way injured, he cannot be heard to complain of the impairment of the obligation of his contract, as a mere abstract proposition.

Many of the earlier cases declare the invalidity of subsequent laws in regard to redemption of land sold under execution, which altered the law existing when a mortgage was made, and some of them, it would seem, have declared the laws unconstitutional, even at the suit of a purchaser at the sale. The leading case on the subject of redemption decides nothing as to the rights of a purchaser. It is that of *Bronson* v. *Kinzie*, (1 How. 311.) In that case the subsequent legislation, which was held to be invalid, gave twelve months after sale in which to redeem, and provided that the property should not be sold under the foreclosure decree unless two-thirds of the amount which had previously been established by appraisers as the value of the property should be bid at the sale. The case came before the court upon a division of opinion. Bronson, the mortgagee, filed his bill to foreclose the mortgage, and asked for a decree that the mortgaged premises should be sold to the highest bidder without being subject to the rule established by the subsequent legislation. The motion was resisted on the part of defendants, who moved that the decree should direct the sale according to the subsequent legislation, and the judges were opposed in opinion as to the sale of the premises without regard to the subsequent law. This court held that the subsequent law was plainly one which impaired the obligation of the contract between the mortgagor and the mortgagee, and at the request of the mortgagee and to prevent the impairment of the obligation of his contract the court decreed that the sale should be made without reference to the law passed subsequently to the time of the execution of the mortgage contract.

McCracken v. *Hayward*, (2 How. 608,) arose in the same way and was decided substantially upon the authority of the last case. The mortgagee made the same request, that the marshal should sell the property without regard to the statute of Illinois passed subsequently to the execution of the mortgage, and it was held that his motion should be granted, because the subsequent legislation impaired his contract as mortgagee with the mortgagor.

In *Gantley* v. *Ewing*, (3 How. 707,) after the mortgage had been executed, the legislature passed an act which required on sales upon execution issued upon a judgment, that the property should first be appraised and should not thereafter be sold on execution for a sum less than one-half the appraised value. The mortgagee foreclosed the mortgage, and upon the sale the premises were sold to the defendants for $76, not a tenth part of the mortgage debt. The property had not been valued prior to the sale,

as required by the statute. An act had, however, been passed prior to the execution of the mortgage requiring the sheriff on such sales to first offer the rents and profits of the real estate for a term of seven years, and if the same did not bring enough to satisfy the execution, then the fee simple was to be offered for sale and sold. This offer to sell the rents and profits was not in fact made. There were two questions upon which the judges were opposed, the one as to the effect of the failure to make the offer to sell the rents and profits, and the other regarding the effect of the failure to make the appraisal. A certificate of division of opinion was sent to this court. The action was, as stated in the opinion, one of ejectment, the defendants setting up and claiming under the sheriff's deed, and the plaintiff, the mortgagee, asking the court to instruct the jury that the deed was void because the rents and profits had not been offered for sale before the fee simple was sold, and also because the land had not been valued as required by the statute before the sale was made. The mortgagee was thus the party claiming that the sale under his own foreclosure was void because of the failure to comply with the subsequent legislation of Indiana, while the defendants who bid at the sale and became the purchasers of the land insisted that the act (existing when they purchased) was unconstitutional, because it altered the law as it existed when the mortgage was made, and required that the land should not be sold until it had been appraised, and then only after at least one-half of the value so appraised had been bid. This court held that the offer to sell the rents and profits for seven years, as provided for by the statute existing prior to the execution of the mortgage, should have been made, and that the sale, such offer not having been made, was void, but it held that the condition provided for in the later statute of not selling unless the appraisal had taken place, and more than one-half such appraised value had thereafter been bid, was void as an impairment of the obligation of the contract between the mortgagor and the mortgagee, and the deed of the sheriff could not, so far as that ground was concerned, be avoided, although no valuation of the property was made before the sale. The case was decided, as the opinion shows, entirely upon the authority of *Bronson* v. *Kinzie*, (*supra*,) which, as we have seen, was not a case of a purchaser and was decided upon the prayer of the mortgagee, who contended that his contract contained in his mortgage would be impaired by the subsequent law if the court should permit it to be enforced.

The question again arose in *Howard* v. *Bugbee*, (24 How 461,) and that case was also decided upon the authority of *Bronson* v. *Kinzie*, (*supra*.) In the statement of facts, by Mr. Justice Nelson, it appears that the mortgage by Parsons to Tait was executed in 1836, and in a subsequent year (1842) the law regarding redemption was altered, and a right was given

to a judgment creditor to redeem for two years after a sale under a mortgage. The mortgage was foreclosed in 1848, and Howard, the appellant, became the purchaser of the premises at the sale under the decree of foreclosure, and obtained a deed of the same duly executed by the proper officer. Bugbee, the appellee, the plaintiff in the court below, recovered judgment against the estate of the mortgagor in 1843, and thereafter, pursuant to the altered law, tendered the purchase money, interest and charges to Howard, the purchaser, and asked for a deed of the land, which was refused. A bill was filed in the court of chancery in Alabama by Bugbee to compel Howard to receive the money in redemption of the sale and execute a deed. The defence was that the mortgage from Parsons, under which the defendant derived title as purchaser at the foreclosure sale, having been executed before the passage of the act providing for the redemption, the act, as respects this debt, was inoperative and void as impairing the obligation of a contract. Now here was a case where the purchase was made at the forclosure sale six years after the law had been enacted providing for redemption, and the question was raised, not by the mortgagor or the mortgagee, but by the purchaser at the sale. The Alabama court of chancery held that complainant was not entitled to the relief asked, and dismissed the bill, but the Supreme Court of that State upon appeal reversed the decree of the court of chancery and entered a decree for the complainant. Upon writ of error from this court it was here decided that the act of the legislature was invalid as an impairment of the mortgage contract, upon the authority of *Bronson* v. *Kinzie*, (*supra*,) which had never decided the particular question.

Upon principle, we cannot see how an independent purchaser, having no connection whatever with the mortgage, excepting as he becomes such purchaser at the foreclosure sale, can raise the question in his own behalf in relation to the validity of legislation as to redemption and rate of interest which existed at the time he made his purchase, and this question, we think, has been clearly determined against the purchaser in the case of *Insurance Company* v. *Cushman*, (*supra*.)

We have no disposition to revise the decision in that case, which, we think, was correct and stands upon a firm foundation. The later case of *Barnitz* v. *Beverly*, (*supra*,) when the facts therein are regarded, does not militate against the soundness of the views expressed in the Cushman case, and in addition to that it was distinctly so stated in the opinion of the court. If a sale be made under a decree directing that it be without regard to the subsequent legislation, as in *Bronson* v. *Kinzie*, (*supra*,) then the purchaser, buying under the decree with those specific directions, takes his rights thereunder. But in that case the decree is obtained in the interest and at the request of the mortgagee, and to save the impairment of his contract.

In our view this independent purchaser must, under the facts herein, abide by the law as it stood at the time of his purchase.

A further question is made by the plaintiff in error, that there was no proper tender made.

Holding the views we do in regard to the main question, it follows that the amount of the bid made by the purchaser carried interest at the rate of one per cent per month only. If that amount at that rate of interest was tendered the sheriff, it was sufficient. The State court has found that such amount was paid to the sheriff by a check which was subsequently paid. Whether the defendant Rhodes fully complied with the requirements of the State statutes in order to make a complete tender, is not a Federal question.

The judgment of the Supreme Court of California is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.